No. 05-259

Title:	Burlington Northern and Santa Fe Railway Company, Petitioner v. Sheila White
Docketed:	August 26, 2005
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(00-6780, 01-5024)
Decision Date:	April 14, 2004
Rehearing Denied:	April 26, 2005

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 13 2005	Application (05A59) to extend the time to file a petition for a writ of certiorari from July 25, 2005 to August 24, 2005, submitted to Justice Stevens.
Jul 20 2005	Application (05A59) granted by Justice Stevens extending the time to file until August 24, 2005.
Aug 24 2005	Petition for a writ of certiorari filed. (Response due September 26, 2005)
Sep 8 2005	Waiver of right of respondent Sheila White to respond filed.
Sep 21 2005	DISTRIBUTED for Conference of October 7, 2005.
Sep 22 2005	Brief amicus curiae of Association of American Railroads filed. (Distributed)
Sep 23 2005	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Sep 30 2005	Response Requested . (Due October 31, 2005)
Oct 31 2005	Brief of respondent Sheila White in opposition filed.
Nov 14 2005	Reply of petitioner Burlington Northern and Santa Fe Railway Company filed.
Nov 16 2005	DISTRIBUTED for Conference of December 2, 2005.
Dec 5 2005	Petition GRANTED limited to Question 1 presented by the petition.
Jan 6 2006	Extension of time within which to file petitioner's brief on the merits to and including January 26, 2006.
Jan 9 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jan 10 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Jan 26 2006	Brief amicus curiae of Association of American Railroads filed.
Jan 26 2006	Joint appendix filed.
Jan 26 2006	Brief of petitioner Burlington Northern Santa Fe Railway Company filed.

Jan 26 2006	Brief amici curiae of Human Resource Management and National Federation of Independent Business Legal Foundation filed.
Jan 26 2006	Brief amici curiae of Equal Employment Advisory Council, and Chamber of Commerce of the United States of America filed.
Jan 26 2006	Brief amicus curiae of International Municipal Lawyers Association filed.
Jan 26 2006	Brief amicus curiae of Pacific Legal Foundation filed.
Feb 28 2006	Extension of time within which to file respondent's brief on the merits to and including March 9, 2006.
Mar 6 2006	SET FOR ARGUMENT on Monday, April 17, 2006.
Mar 9 2006	Brief amici curiae of American Federation of Labor and Congress of Industrial Organizations, et al. filed.
Mar 9 2006	Brief amicus curiae of United States filed.
Mar 9 2006	Brief amici curiae of National Women's Law Center, et al. filed.
Mar 9 2006	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
Mar 9 2006	Brief amici curiae of National Employment Lawyers Association, et al. filed.
Mar 9 2006	Brief of respondent Sheila White filed.
Mar 13 2006	Record received from U.S.C.A. 6th Circuit. (1 binder)
Mar 15 2006	Supplemental brief of respondent Sheila White filed. (Distributed)
Mar 17 2006	CIRCULATED.
Mar 17 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 21 2006	Record received from U.S.D.C. for Western District of Tennessee. (1 box)
Mar 23 2006	Letter regarding the Solicitor General's motion from counsel for petitioner received. (Distributed)
Mar 27 2006	Letter regarding the Solicitor General's motion from counsel for respondent received. (Distributed)
Apr 3 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. the time is to be divided as follows: 25 minutes for the petitioner, 25 minutes for the respondent, and 10 minutes for the Solicitor General.
Apr 7 2006	Reply of petitioner Burlington Northern and Santa Fe Railway Company filed. (Distributed)
Apr 17 2006	Argued. For petitioner: Carter G. Phillips, Washington, D.C. For Untied States, as amicus curiae: Gregory G. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Donald A. Donati, Memphis, Tenn.

Supreme Court, U.S.
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No. 05-259

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer may be held liable for retaliatory discrimination under Title VII for any "*materially adverse change* in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "*ultimate* employment decision" (as two other courts of appeals hold).

2. Whether a plaintiff, whose evidence on liability is deemed sufficient by a court of appeals, is permitted a stand-alone retrial on punitive damages under a mere preponderance-of-the-evidence standard, rather than a clear-and-convincing-evidence standard.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), formerly known as Burlington Northern Santa Fe Railway Co., is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation. No publicly held company owns 10% or more of the stock of Burlington Northern Santa Fe Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner BNSF respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Western District of Tennessee, in which it denied BNSF's motion for judgment as a matter of law or a new trial, is unreported, and is reproduced in the Appendix to this Petition ("Pet. App.") at 116a-122a. The initial decision of the Sixth Circuit is reported at 310 F.3d 443 (6th Cir. 2002), and is reproduced at Pet. App. 84a-115a. The Sixth Circuit granted rehearing en banc in an order that is reported at 321 F.3d 1203 (6th Cir. 2003), and reproduced at Pet. App. 123a-124a. The en banc decision of the Sixth Circuit—which is the judgment under review here—is published at 364 F.3d 789 (6th Cir. 2004), and is reproduced at Pet. App. 1a-83a. Following the decision of the Sixth Circuit sitting en banc, that court denied a petition for further rehearing en banc, in an unpublished order that is reproduced at Pet. App. 125a-126a.

JURISDICTION

The court of appeals, sitting en banc, entered judgment on April 14, 2004, Pet. App. 1a, and denied further rehearing en banc on April 26, 2005, *id.* at 125a-126a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On July 20, 2005, Justice Stevens extended the time for filing a petition in this case to and including August 24, 2005.

STATUTES OR OTHER PROVISIONS INVOLVED

42 U.S.C. § 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees

> or applicants for employment, ..., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. 1981a(b)(1) provides in relevant part:

> A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

STATEMENT

The decision below is only the latest manifestation of a mature, broad conflict among the courts of appeals on a critical issue of federal employment discrimination law—namely, what acts suffice to create employer liability under Title VII's anti-retaliation provision. On this issue, the lower courts are in disarray. All twelve regional courts of appeals have addressed the issue, and the result is three different legal standards that often lead to fundamentally different results in similar cases. Indeed, conflicts attend numerous aspects of the inquiry into adverse employment actions, including whether and when job reassignments and temporary suspensions with no tangible loss are actionable. These multiple, well-acknowledged and interrelated conflicts on a fundamental issue of federal employment law require this Court's review.

The importance of these conflicts is heightened in this case by the overlay of mistaken rulings on critical issues of punitive damages. In the decision below, a severely divided en banc court of appeals held by an 8-5 vote that the evidentiary burden on a plaintiff seeking punitive damages under Title

VII is only a preponderance of the evidence. That ruling is contrary to this Court's repeated statements that extraordinary sanctions require a higher burden of proof and it is, furthermore, contrary to the overwhelming trend in the States both at the time of the statute's enactment and today. What is more, the court ordered remand for a retrial on punitive damages alone—a procedure that violates the Seventh Amendment and conflicts with the precedents of this Court and the Fifth Circuit concerning partial retrials. This case, in short, presents an excellent vehicle for this Court to resolve disarray in the lower courts and to answer important questions concerning the interpretation of Title VII and the proper administration of punitive damages. The petition should be granted.

I. STATUTORY BACKGROUND

1. Section 704 of Title VII of the Civil Rights Act of 1964 prohibits retaliatory discrimination. Specifically, it forbids an employer from discriminating against an employee because she opposes unlawful employment practices, or because she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The purpose of this provision is simple: to "[m]aintain[] unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997).

It is well established that, in order to prove unlawful retaliation, a plaintiff must demonstrate (1) that she engaged in protected conduct (specifically, the "oppos[ition]" or "partici-pat[ion]" referred to in § 704(a)); (2) that the employer took an "adverse employment action" against the plaintiff; and (3) that the adverse action was taken because of the protected conduct. 1 Barbara Lindeman & Paul Grossman, *Employment Discrimination Law* 672 & n.169 (3d ed. 1997).

The second of these requirements—that the employer must have taken adverse action against the plaintiff—is the subject of massive confusion in the lower courts and is implicated by

the first question presented. Although it is settled that some adverse action is necessary to prove an employer's liability for retaliation,[1] this Court never has defined what constitutes an "adverse employment action," and the courts of appeals have interpreted that term in inconsistent ways.

2. Once liability has attached under the anti-retaliation provision, then punitive damages are available if the plaintiff can show that the employer "engaged in unlawful intentional discrimination," 42 U.S.C. § 1981a(a)(1), and did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," *id.* § 1981a(b)(1). But the statute is silent as to the plaintiff's burden of proof: *i.e.*, whether the plaintiff must prove malice or reckless indifference by a preponderance of the evidence, or by clear and convincing evidence. That is the core of the second question presented.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

1. Plaintiff Sheila White was a maintenance-of-way employee at BNSF's Tennessee Yard in Memphis. Pet. App. 3a. She was the only woman working in the yard at the time. *Id.* She testified that in her role as track laborer, she spent a majority of her time working outside in the rail yard, I Trial Tr. 99, and the remainder working on a forklift (although elsewhere she testified that she spent a majority of her time on the forklift and a "good bit" of her time on other maintenance-of-way duties, see II Trial Tr. 194-96).

On September 16, 1997, White complained that she was the victim of harassing conduct by her immediate supervisor, Bill

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[1] *See, e.g.*, Pet. App. 11a-12a & n.2 (describing the origin of the "adverse employment action" requirement); *cf. Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 269, 273 (2001) (per curiam) (referring to alleged "adverse employment actions" taken against a plaintiff).

[2] Although there was conflicting testimony on certain points, the following account construes the evidence in favor of White as the prevailing party.

Joiner, and others as a consequence of her gender. After investigation, BNSF suspended Joiner without pay for ten days and ordered him to attend a program on preventing sexual harassment. Pet. App. 4a.

On September 26, 1997, the roadmaster of the Tennessee Yard, Marvin Brown, informed White of the disciplinary action taken against Joiner, but also informed her that in the course of the investigation the company had discovered that men in the yard believed that she had been unfairly assigned forklift operator duties, which are less "arduous" and "cleaner" than other track-laborer work, even though other employees had greater seniority. Pet. App. 4a-5a. Brown removed White's forklift responsibilities, and that duty was then performed by an employee with greater seniority. *Id.*

In response, on October 10, 1997, White filed a charge with the EEOC alleging sex discrimination and retaliation. Pet. App. 5a. The former charge was based on the original actions by Joiner, and the latter on White's reassignment off the forklift. On December 4, 1997, White filed a second charge alleging that Brown had placed her on increased surveillance. *Id.* That charge was mailed to Brown on December 8, 1997. Three days later, White was involved in a dispute with another employee, and Brown suspended her without pay for insubordination. *Id.* at 5a-6a. Under the applicable collective bargaining agreement, White had 15 days within which to file a grievance to contest the disciplinary action, *id.* at 6a-7a, which she did. Prior to the formal hearing, the superintendent of BNSF's Tennessee territory met with the union representatives in the first stage of the grievance procedure, and reversed the suspension, reinstating White to service with full back pay, which covered the 37 days she was suspended. *Id.* at 7a.

2. After exhausting her administrative remedies with the EEOC, White filed suit against BNSF in the United States District Court for the Western District of Tennessee, alleging sex discrimination and retaliation. Pet. App. 7a. White pre-

sented two alternative theories of retaliation: that Brown retaliated against her for filing an internal complaint against Joiner when he removed her from forklift duty in September 1997, and that after the filing of the EEOC charges Brown retaliated against her by suspending her without pay. Pet. App. 118a-119a.

The case was tried to a jury, which found for BNSF on the underlying sex discrimination claim but entered a verdict in favor of White on the retaliation claim. Pet. App. 7a. The jury awarded $43,000 in compensatory damages and concluded—employing the clear-and-convincing-evidence standard of proof set forth in the jury instruction—that White was not entitled to punitive damages. *Id.* at 7a, 28a. The district court denied BNSF's motion for a judgment as a matter of law, *id.* at 7a, and both sides appealed—BNSF on the retaliation verdict, and White on the standard of proof for punitive damages used in the jury instruction.

3. A divided three-judge panel of the Sixth Circuit ruled that the judgment against BNSF should be reversed because there was no adverse employment action as required for a retaliation claim under Title VII. Pet. App. 85a. It noted that White suffered no loss of job title, and no diminution of salary, wages or benefits. *Id.* at 95a. That the work as a track laborer (rather than as a forklift operator) may have been more physically demanding was immaterial; BNSF "hired White as a track maintenance worker," and "[o]ne of her explicit job responsibilities was to maintain the railroad tracks." Accordingly, the panel held, "[w]e fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her." *Id.* at 96a. Nor, the panel held, was White's temporary suspension (followed by subsequent reinstatement with backpay) an adverse employment action. Temporary suspensions, it held, are not sufficiently final to be actionable, and it noted that this suspension "was only an interim decision." *Id.* at 101a. Because

the panel held that there was no retaliation, it did not address punitive damages. *Id.* at 103a.

The court of appeals reheard the case en banc. In analyzing the standard for proving retaliation, the court acknowledged the entrenched three-way conflict among the federal courts of appeals as to the proper standard for analyzing adverse employment actions. It noted that in the Fifth and Eighth Circuits, intermediate employment decisions such as those involved in this case do not suffice, because the employer's action must be an "'*ultimate* employment decision.'" Pet. App. 21a (emphasis added). The court, however, "reject[ed] the 'ultimate employment decision' standard" as too limiting. *Id.* (emphasis added); see also *id.* at 22a-24a.

It also expressly "reject[ed]" the Ninth Circuit's adoption of the broad EEOC standard, Pet. App. 18a, that discrimination consists of any adverse retaliatory treatment that is "reasonably likely to deter" the affected person from engaging in protected activity. *Id.* at 15a-18a. Instead, it held (as other circuits likewise have done) "that a plaintiff ... must show that she suffered 'a materially adverse change in the terms of her employment,'" *id.* at 13a, but (contradicting the panel's application of that standard) determined that both the reassignment of White to other duties within her job description, as well as the temporary suspension, were sufficient to trigger employer liability for retaliation under Title VII. *Id.* at 19a-25a.

On White's cross-appeal, the court split 8-5 on the proper standard of proof for awarding punitive damages in a Title VII case. Title VII authorizes punitive damages when a defendant discriminates intentionally and "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(a)(1), (b)(1). The court divided over how to interpret Congress's silence regarding the requisite standard of proof. The majority held that the district court had erred in requiring White to put forward clear and convincing evidence that she was entitled to punitive

damages; rather, it held, the appropriate standard is a mere preponderance. Pet. App. 28a; see generally *id.* at 29a-33a.

Judge Sutton dissented, joined by four other judges. Relying on this Court's precedents (which require clear-and-convincing proof when severe and stigmatizing consequences will be imposed, and which recognize the special consequences of punitive damages), Pet. App. 54a-56a, and the trend in the States (which overwhelmingly favors the higher standard), *id.* at 56a-57a, the dissent determined that "a punitive damages claim represents an unconventional form of relief, which deserves a heightened rather than a run-of-the-mill standard of proof," *id.* at 52a. Accordingly, the dissenters would have held that the district court was right to require clear and convincing proof.

Finally, the court remanded for a retrial on "punitive damages only." Pet. App. 34a. It failed to address whether the facts relevant to punitive damages are intertwined with facts concerning the underlying question of liability such that a partial remand is forbidden under this Court's precedents. It simply ordered a single-issue retrial. As a result, BNSF sought further rehearing en banc or, alternatively, a clarification from the en banc court. The court issued a short order declining to revisit the remand issue. Pet. App. 125a-126a.

REASONS FOR GRANTING THE PETITION

In the decision below, the Sixth Circuit improperly held that temporary employment actions that are corrected by senior management, and reassignment of duties within the same job, constitute discriminatory retaliation. It further concluded that punitive damages for such conduct may be awarded under a mere preponderance of the evidence, then improperly remanded for a partial trial on punitive damages only. Each of these related errors merits review. On the first issue, the appropriate standard for proving an adverse employment action has for some time been the source of "real and growing

disarray" in the federal courts of appeals. Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1126 (1998). Twelve federal courts of appeals have weighed in on this issue, and the result is an intractable, well-acknowledged three-way circuit split on this fundamental issue of federal law. This Court's review is necessary to bring uniformity and certainty to this badly muddled area of law.

Second, review is necessary to resolve two related issues of punitive damages jurisprudence. The first is the proper standard of proof for an award of punitive damages under Title VII. The standard of proof is often outcome-determinative, and that is nowhere more true than in Title VII cases, where factual issues abound and questions of motive and intent are hotly disputed. This Court has stated that the clear-and-convincing standard is appropriate for extraordinary and stigmatizing sanctions, and likewise has made clear that punitive damages are unquestionably extraordinary. This critical issue, which divided the court of appeals 8-5, clearly merits review. The petition should also be granted to address the Sixth Circuit's holding that a partial remand for retrial on punitive damages alone is appropriate, which conflicts with rulings of both this Court and the Fifth Circuit. This Court has recognized for some 70 years that, under the Seventh Amendment and principles of fair trials, partial remands are inappropriate when multiple issues are intertwined. That is precisely the circumstance here, where the availability of punitive damages is inseparable from underlying issues of liability. The intractable conflict of authority on a critical issue of federal employment law is reason enough for certiorari to be granted; that it presents two extraordinarily important issues concerning punitive damages underscores the need for review.

I. REVIEW IS WARRANTED TO RESOLVE THE THREE-WAY CONFLICT, ENCOMPASSING TWELVE COURTS OF APPEALS, REGARDING THE ANTI-RETALIATION PROVISION OF TITLE VII.

A. Certiorari Is Needed To Resolve The Entrenched Conflict Of Authority.

The federal courts of appeals are badly divided over the proper standard for determining when an employer has engaged in retaliatory discrimination against an employee for purposes of Title VII. See, *e.g.*, 2 Lex K. Larson, *Employment Discrimination* § 34.04, at 34-47 (2d ed. 2005) ("Because no definition of 'discrimination' is provided in the statute ... courts disagree on which types of actions are prohibited by the Title VII anti-retaliation provision."). Numerous courts have acknowledged the circuit split, and in so doing, have made it abundantly clear that only review by this Court can bring order to this body of law. *E.g.*, Pet. App. 15a-19a, 21a; *Noviello* v. *City of Boston*, 398 F.3d 76, 89 (1st Cir. 2005); *Zaffuto* v. *City of Hammond*, 308 F.3d 485, 492 & n.7 (5th Cir.), *on reh'g*, 313 F.3d 879 (5th Cir. 2002) (per curiam); *Ray* v. *Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

The chaos is such that courts and commentators even disagree about to how to characterize the various courts of appeals' positions within the circuit split. The Larson treatise concludes that there is a three-way split, with at least four circuits requiring a showing of a "'materially adverse change in the terms and conditions of employment'"; two circuits (the Fifth and Eighth) requiring a greater showing (specifically, an "'ultimate employment decision'"); and the Ninth Circuit setting the bar the lowest, by requiring the plaintiff to identify only an action that was "'reasonably likely to deter employees from engaging in protected activity.'" 2 Larson, *supra* § 34.04, at 34-48 to 34-53. The Ninth Circuit, however,

views the conflict differently, and paints itself as firmly in the majority. It describes itself as aligned with a majority of circuits "that define adverse employment action broadly." *Ray*, 217 F.3d at 1240. Like Larson, the Ninth Circuit characterizes the Fifth and Eighth Circuits as holding "[t]he most restrictive view." *Id.* But where Larson places the Second and Third Circuits in the majority, the Ninth Circuit characterizes those courts as holding only an "intermediate position." *Id.*

Then there is the decision below, which disagrees with the Ninth Circuit in every particular. The Sixth Circuit rejected the "ultimate employment decision" test adopted by the Fifth and Eighth Circuits, but unlike the Ninth Circuit, questioned whether the Fifth Circuit still adheres to the test and whether (at least in certain cases) the Eighth Circuit's application of the test was materially different from its own. Pet. App. 21a.[3] The court below, however, concluded that the Ninth Circuit—the only court to adopt the EEOC standard—is out on its own, and roundly rejected that court's approach, *id.* at 15a-19a. The depth and intractability of this conflict, and the extent of the confusion in the circuits, can be readily demonstrated from a detailed review of the relevant decisions of the courts of appeals.

1. Two circuits, the Fifth and Eighth, hold that in order to make out a claim for actionable retaliation, an employee must show that action taken by the employer was an "ultimate em-

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[3] The decision below wrongly suggests that the "ultimate employment decision" standard may no longer be valid in the Fifth Circuit, because a panel of that court in 2001 asked (but did not answer) whether that test had been superseded by this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998) (which is discussed *infra*). *See* Pet. App. 21a (citing *Fierros* v. *Texas Dep't of Health*, 274 F.3d 187, 192-93 & n.2 (5th Cir. 2001)). The Fifth Circuit, however, has in the years since *Ellerth*, repeatedly reaffirmed the validity of the "ultimate employment decision" test and declared its consistency with *Ellerth*. *See Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Hernandez* v. *Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir.) (per curiam), *cert. denied*, 540 U.S. 817 (2003); *Zaffuto*, 308 F.3d at 493.

ployment decision." *Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). This test encompasses "acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern*, 104 F.3d at 707; see also *Von Gunten* v. *Maryland*, 243 F.3d 858, 864-65 (4th Cir. 2001) (the "'ultimate employment decision' standard .... involve[s] hiring, firing, refusal to promote, [and] the like"); cf. *Hockman* v. *Westward Communications, LLC*, 407 F.3d 317, 330-31 (5th Cir. 2004) (identifying employment decisions that are *not* "ultimate").

Although the nomenclature is different, the rule of the Fifth and Eighth Circuits comports with the "tangible employment action" standard that this Court announced in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). See *Zaffuto*, 308 F.3d at 493 (relying on *Ellerth*). *Ellerth* addressed the vicarious liability of employers under section 703(a) of Title VII for sex discrimination by supervisors. Apart from claims of hostile work environment, 524 U.S. at 763, this Court held that on agency principles an employer is liable for "a tangible employment action," even when such actions reflect only personal animus, but not for lesser acts, *id.* at 762-63.

In reaching its conclusion, this Court defined the term "tangible employment action" as "*a significant change in employment status*, such as hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits." *Id.* at 761 (emphases added). This Court emphasized that only "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision *requires an official act of the enterprise, a company act.*" *Id.* at 762 (emphasis added); see also *Pennsylvania State Police* v. *Suders*, 124 S. Ct. 2342, 2353 (2004) (reaffirming this aspect of *Ellerth*). The Court further emphasized that liability is fairly

attributed to the employer because in rendering such tangible employment actions "[t]he supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Ellerth*, 524 U.S. at 762. It is thus clear that interim or minor actions of supervisory personnel that are not the ultimate "official act" of the company are not "tangible employment actions" under *Ellerth* and cannot result in liability.

Although the Sixth Circuit pledged fealty to *Ellerth* in announcing its standard and rejecting the rule of the Fifth and Eighth Circuits, Pet. App. 14a, it simply misread *Ellerth*, which excluded liability for just the types of activities alleged here to have been retaliatory. Indeed, this Court in *Ellerth* cited favorably lower-court cases that, in contradistinction to the decision below, recognized that a "demotion without change in pay, benefits, duties, or prestige [is] insufficient" to establish discrimination, as is "reassignment to [a] more inconvenient job." 524 U.S. at 761. Thus, the interim suspension without pay imposed by roadmaster Brown was not the end result of the company's "internal processes," *id.* at 762. The ultimate act of BNSF in this context was the superintendent's lifting of the suspension and his restoration to White of full pay for the period in which she did not work, which is hardly an act of retaliation. Nor does the roadmaster's relieving White of her forklift duties and assigning her to other tasks within her job classification—tasks that are no different from those performed by other, more senior maintenance-of-way employees, and that she already was devoting a substantial portion of her time to performing—constitute a tangible employment action sufficient to create employer liability. The manager's assignment of a worker to "[a] more inconvenient job" simply does not create employer liability. *Id.* at 761.

2. Prior to the en banc decision below, the Sixth Circuit's "adverse employment action" standard was consistent with the "ultimate employment decision" standard of the Fifth and Eighth Circuits, and BNSF would have prevailed under that

standard, as the initial Sixth Circuit panel in this case ruled. Pet. App. 93a-103a; *Kocsis v. Multicare Mgmt. Inc.*, 97 F.3d 876, 885, 886 (6th Cir. 1996) (holding that neither a "'mere inconvenience or an alteration of job responsibilities,'" nor a "'bruised ego'" is enough to constitute discrimination, and "reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims"), *cited in Ellerth*, 524 U.S. at 761; *Dobbs-Weinstein* v. *Vanderbilt Univ.*, 185 F.3d 542, 545-46 (6th Cir. 1999) (an employment action—specifically, denial of tenure—is not an actionable adverse employment action when it is subject to further review).

Indeed, the decision below strongly signaled disapproval of *Dobbs-Weinstein*, see Pet. App. 19a-22a & n.7, which relied upon the "ultimate employment action" standard. And, although the decision below purported to rely on *Kocsis*, see, *e.g.*, Pet. App. 13a-14a, 18a, 25a, it simply is impossible to square *Kocsis* with the temporary suspension and reassignment without loss of pay that occurred here. By diluting the "adverse employment action" standard to reach interim suspensions rescinded with full back pay and reassignment to more inconvenient duties within an employee's job classification, the court below created a significant split with the Fifth and Eighth Circuits. Other courts of appeals have likewise expressly rejected the test adopted by the Fifth and Eighth Circuits. See *id.* at 21a; *Von Gunten*, 243 F.3d at 865 ("'ultimate employment decision' is not the standard in this circuit"); *Ray*, 217 F.3d at 1242; *Wideman*, 141 F.3d at 1456.

Nominally, the Sixth Circuit's standard—that an "adverse employment action" occurs when an employee is subjected to "'a materially adverse change in the terms of her employment,'" Pet. App. 13a—mirrors the standard adopted by eight other circuits.[4] In practice, however, it departs from decisions

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[4] *See Marrero* v. *Goya of P.R., Inc.*, 304 F.3d 7, 27, 29 (1st Cir. 2002) (requiring a showing that a transfer was "materially adverse"); *Fairbrother* v. *Morrison*, 412 F.3d 39, 56 (2d Cir. 2005) ("An adverse em-

of some of those courts that employ the same terminology of "materially adverse change." For instance, the Seventh Circuit has held that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities," and that a transfer to a new job with—as here—the same salary and benefits, and different but no less significant responsibilities, was not actionable. *Crady* v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993).

As the Sixth Circuit acknowledged, the "ultimate employment decision" test would have led to a different result in this case. Pet. App. 22a. The court rejected the "'ultimate employment decision' standard" precisely because, on its view, "the employment action taken in the present case ... is not the type of employment action that this court developed the adverse-employment-action element to filter." *Id.* See also *Von Gunten*, 243 F.3d at 864-65 (holding that the "materially adverse change" standard protects against employer actions that the "ultimate employment decision" test does not).

3. Finally, the Ninth Circuit has yet another approach, all its own, for identifying when employer conduct is sufficiently serious to violate the anti-retaliation provision of Title VII. In *Ray*, that court adopted the standard suggested by the EEOC, and held that an "adverse employment action" is "'any adverse treatment that is based on a retaliatory motive and is

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ployment action is a "'materially adverse change" in the terms and conditions of employment.'"); *Mondzelewski* v. *Pathmark Stores, Inc.*, 162 F.3d 778, 787 (3d Cir. 1998) ("[c]ourts customarily ... [require] a retaliation plaintiff [to] show that he or she suffered a 'materially adverse employment action'"); *Von Gunten*, 243 F.3d at 865; *Ribando* v. *United Airlines, Inc.*, 200 F.3d 507, 510-11 (7th Cir. 1999) ("the adverse job action must be 'materially' adverse, meaning more than 'a mere inconvenience or an alteration of job responsibilities'"); *Medina* v. *Income Support Div., N.M.*, 413 F.3d 1131, 1136 (10th Cir. 2005); *Wilbur* v. *Correctional Servs. Corp.*, 393 F.3d 1192, 1202 n.5 (11th Cir. 2004); *Brown* v. *Brody*, 199 F.3d 446, 456 (D.C. Cir. 1999).

reasonably likely to deter the charging party or others from engaging in protected activity.'" 217 F.3d at 1242-43.

It is widely recognized that the Ninth Circuit's standard differs from and conflicts with the two standards set forth above, notwithstanding that court's assertions to the contrary, see *id.* at 1240, 1241, 1243. In the decision below, for instance, the majority expressly recognized that the Ninth Circuit's test differs from the "materially adverse change" test that it adopted, Pet. App. 15a, and rejected that test, *id.* at 18a; see also *id.* at 35a (Clay, J., concurring) (recognizing the distinction between the Ninth Circuit's test and the one adopted by the en banc majority; advocating adoption of the Ninth Circuit standard). The Ninth Circuit, for its part, rejected the test of the Fifth and Eighth Circuits. See *Ray*, 217 F.3d at 1242. Other courts similarly have recognized the difference between the tests. *E.g.*, *Sanders* v. *New York City Human Res. Admin.*, 361 F.3d 749, 756 (2d Cir. 2004); *Von Gunten*, 243 F.3d at 863 n.1 (rejecting the EEOC's "reasonably likely to deter" test).

4. The result of this confusion among the circuits is that the happenstance of where a case is litigated regularly determines its outcome. That is surely true in this case. The Sixth Circuit determined that when White was suspended without pay (a determination reversed through internal grievance processes one month later, and backpay given), and when she was transferred to a new job that purportedly was "more arduous and 'dirtier,'" she was subjected to materially adverse changes in her employment. Pet. App. 19a-25a.

Because these actions were not "ultimate employment decisions," however, they would not have been actionable in the Fifth and Eighth Circuits. They are not "ultimate" in the sense that they do not rise to the level of seriousness that those courts require—in contrast, for instance, to hiring and firing—and the temporary suspension without pay is not "ultimate" in the sense that it is not the official act of the company regarding her employment status, as evidenced by the

fact that White was reinstated and given backpay by the superintendent. See, *e.g.*, *Okruhlik* v. *University of Ark.*, 395 F.3d 872, 880-81 (8th Cir. 2005) (where denial of tenure was not fully finalized because the plaintiff failed to seek full internal review, there was no "adverse employment action"); *Saulsberry* v. *St. Mary's Univ.*, 318 F.3d 862, 868 (8th Cir. 2003) (temporary employment actions are not actionable); *Brazoria County*, 391 F.3d at 692-93; *Hernandez*, 321 F.3d at 531-33; *Zaffuto*, 308 F.3d at 493-94.[5]

B. Certiorari Also Should Be Granted Because The Issue Is Important And Recurring.

1. The depth of the circuit split set forth above, and the breadth of the confusion that attends it, are ample reason for this Court to grant the petition. The need for review is all the more compelling because this issue arises repeatedly, both in the specific context of Title VII and in closely related statutes.

First, this issue arises with great frequency. Were that not apparent from the fact that every regional court of appeals has weighed in on the issue, it is confirmed by even the briefest review of the annotated United States Code, which lists hundreds of cases related to 42 U.S.C. § 2000e-3(a) under the heading of "retaliatory acts." Indeed, in fiscal year 2004 alone, more than 20,000 charges of retaliatory discrimination under Title VII were filed with the EEOC, and the trend is strongly upward—this is twice as many retaliation charges as were filed in 1992. See EEOC, Charge Statistics FY 1992 Through FY 2004, *at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005). The volume of these cases provides a compelling reason for this Court to intervene to pro-

[5] In this regard, moreover, the decision below further conflicts with at least four other circuits that hold that an otherwise adverse employment action that has been cured is not a proper basis for a Title VII retaliation suit. *See Taylor* v. *Small*, 350 F.3d 1286, 1293-94 (D.C. Cir. 2003) (citing cases from the Fifth, Ninth and Eleventh Circuits, as well as the opinion of the three-judge panel in this case).

vide the uniformity, certainty and stability that are necessary in this heavily litigated body of law. The lower courts have had ample opportunity to resolve their differences, and their failure to do so indicates that no such resolution will occur absent this Court's involvement. In the meantime, numerous cases will be decided according to divergent standards until this Court clarifies the law.

What is more, the confusion in this aspect of Title VII has spawned analogous disarray in the numerous federal statutes that contain similar anti-retaliation provisions. Such prohibitions appear in, among other statutes, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d); the Equal Pay Act, *id.* § 215(a)(3); the Family and Medical Leave Act, *id.* § 2615; and the False Claims and Major Fraud Act, 31 U.S.C. § 3730(h); and similar principles govern retaliatory discharge in violation of the First Amendment, see *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968).

Given the maxim that similar provisions in similar statutes should be interpreted *in pari materia*, see 2B Norman J. Singer, *Sutherland on Statutory Construction* § 51.02, at 176-78 (6th ed. 2000)—a principle that applies to antidiscrimination statutes[6]—it was inevitable that the multiple, inconsistent tests under Title VII would spill over into related areas of the law, and this is precisely what has happened. Courts interpreting anti-retaliation provisions of other statutes rely upon cases interpreting the anti-retaliation provision of Title VII. In so doing, the same divisions of authority set forth above have been introduced into those related statutes. *E.g.*, *Shotz* v. *City of Plantation, Fla.*, 344 F.3d 1161, 1180-82 (11th Cir. 2003) (in an ADA case, importing the materiality standard

[6] *See, e.g.*, *Brown*, 199 F.3d at 456 n.10 ("Courts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims, ADEA claims, and even ERISA claims.... For the same reason, courts rely on cases applying like-worded retaliation provisions in different statutes." (citations omitted)).

from Title VII case law); *Moore* v. *California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 847-48 (9th Cir. 2002) (in a False Claims Act case, citing *Ray*, and importing the Ninth Circuit's "reasonably likely to deter standard").

That the state of the law within Title VII itself is in disarray is reason enough for this Court to grant certiorari; that those problems are radiating out into other related areas of the law reinforces the need for this Court's review.

2. Review is particularly important because of the ramifications of the Sixth Circuit's decision that temporary suspensions without pay and assignments to less convenient duties are actionable as retaliation under Title VII. The ruling below will jeopardize legitimate employer practices by the imposition of unwarranted and unpredictable litigation risk.

In *Ellerth*, this Court recognized that Congress, in Title VII, favored a policy of "conciliation rather than litigation." 524 U.S. at 764. But a rule that a temporary, reversible unpaid suspension is actionable retaliation would subvert this goal by undermining the grievance process that stands in the stead of litigation. That grievance mechanism is the process by which companies like BNSF rectify their supervisors' mistakes—mistakes that are inevitable in a decentralized company where line management must take immediate action. See *id.* ("Title VII is designed to encourage the creation of ... effective grievance mechanisms.").

Employers must have the latitude to allow line management to suspend employees from service immediately for insubordination or other types of misconduct—including, for example, drug or alcohol abuse, violation of safety or work rules, and embezzlement or theft. Insubordination is particularly intolerable in the railroad context, where clear observance of lines of authority is critical to both the safety and efficiency of operations. Under the Sixth Circuit's ruling, employers cannot undertake such workplace control measures without incurring substantial litigation risk if the employee has previ-

ously filed discrimination complaints or charges from legitimate suspensions, or has been a witness or otherwise participated in a Title VII proceeding. Because litigation risk and cost is substantial even when retaliation claims are meritless, the net result is deterrence of legitimate suspensions of employees engaging in misconduct.

The Sixth Circuit suggests that employers may still safely suspend employees so long as they do so *with pay*. Pet. App. 24a. But that is no solution at all, because it systematically and unfairly places employers at substantial economic disadvantage in the usual case when the suspension is legitimate. The reason is that if the employer must continue to pay a suspended employee for periods when the employee does not work, the employer will have no practical recourse for recovering the money if the suspension is upheld and the employee is ultimately terminated. In many circumstances, employees will have spent their wage checks and will be effectively judgment-proof. Employers who may only avoid retaliation litigation by paying suspended employees their full, unrecoverable wages for work not performed will be deterred from suspending many employees even if the employee's misconduct clearly warrants the suspension. Nothing in Title VII compels such an aberrant and detrimental result that is contrary to sound business practice.

Moreover, extending Title VII liability to trivial actions such as reassigning an employee to duties within his or her job description that are less appealing (but no different from those performed by other workers in the same job classification or, as here, by the same worker for part of the time) means as a practical matter that a Title VII complainant or witness cannot be subject to normal supervision and direction by management. Retaliatory motive is almost always a matter of jury inference, and thus any supervisory action that is arguably adverse can become the basis of litigation. To avoid litigation risk, an employer and its managerial employees have little option but to treat such employees with kid gloves,

ensuring that any reassignment of duties is inarguably neutral or preferential. This is exactly the wasteful result that this Court in *Ellerth* and courts of appeals adhering to a more stringent standard of retaliation liability have sought to prevent. Furthermore, a temporary suspension without pay that is timely corrected by senior management is not on the whole unjust to the employee whose suspension was improper and retaliatory. Although there may be some hardship during the pendency of the proceeding, a vindicated employee will end up receiving full pay for periods in which, after all, he or she did not have to work.

All of these considerations support the notion that minor and interim employment actions should not be actionable retaliation. A contrary rule will make it impossible for employers ever to take such actions without the specter of litigation. At a minimum, they underscore the immediate importance of this Court's review of a critical Title VII issue on which the lower courts are badly divided.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW ERRONEOUSLY PERMITS PUNITIVE DAMAGES TO BE AWARDED UPON PROOF BY A MERE PREPONDERANCE OF THE EVIDENCE.

1. This Court should additionally grant the petition to consider the important federal question of what standard of proof is borne by a plaintiff who seeks punitive damages under Title VII, which divided the en banc Sixth Circuit 8-5. That statute permits punitive damages if the plaintiff shows that the employer acted intentionally, and "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(a)(1), (b)(1). The statute does not, however, specify a standard of proof, and this statutory gap led to error below. The court below mistakenly held that a plaintiff may receive extraordinary relief in the form of punitive damages upon proof by a mere prepon-

derance of the evidence. Pet. App. 28a. It is true, to be sure, that "[c]onventional rules of civil litigation" apply when "conventional relief" is at issue. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 253 (1989) (plurality). But, conversely, *non*conventional sanctions—i.e., those that impose special burdens or special stigma—are subject to a heightened standard of proof. Punitive damages are not merely nonconventional, but indeed are quasi-criminal. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003). When Congress has not specified a burden of proof, it is this Court's job to "prescribe the standard," *Steadman* v. *SEC*, 450 U.S. 91, 95 (1981); *Woodby* v. *INS*, 385 U.S. 276, 284 (1966), and the petition should be granted to resolve this critical question of federal law.

The standard of review that attends proof under a given statute is an issue of surpassing importance. As this Court has explained:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. *Texas*, 441 U.S. 418, 423 (1979) (citation omitted).

For precisely these reasons, when a statute imposes extraordinary sanctions—such as the punitive damages remedy available under Title VII—and Congress has not specified the movant's burden of proof, clear and convincing proof is required. As Judge Sutton correctly noted in his dissent, Pet. App. 54a-56a, this Court has recognized the use of the clear-and-convincing burden "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defen-

dant," *Addington*, 441 U.S. at 424. It has cited approvingly the heightened burden of proof that attends cases involving civil fraud, adultery, illegitimacy, lost wills and oral contracts. *Woodby*, 385 U.S. at 285 n.18. And it has imposed the clear-and-convincing burden in the contexts of deportation, *id.* at 285, and denationalization, *Nishikawa* v. *Dulles*, 356 U.S. 129, 134-35 (1958), among others.

As Judge Sutton pointed out, the punitive damages remedy falls squarely within these boundaries. *Addington* recognizes that clear and convincing proof commonly is required for "quasi-criminal wrongdoing," 441 U.S. at 424, and that is exactly how this Court has characterized punitive damages. See Pet. App. 55a-56a (Sutton, J., dissenting). Punitive damages "serve the same purposes as criminal penalties"—namely, "deterrence and retribution." *State Farm*, 538 U.S. at 416, 417; *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 287 (1989) (O'Connor, J., concurring in part and dissenting in part). Such damages differ markedly from traditional compensatory relief, the purpose of which is "'to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" *State Farm*, 538 U.S. at 416; *Cooper Indus., Inc.*, v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Because punitive damages are designed to punish reprehensible conduct, *State Farm*, 538 U.S. at 418-19; *Gore*, 517 U.S. at 575, and because such damages impose a special stigma upon a defendant, they require special procedural protections.[7] It is under just such circumstances that this Court has recognized the clear-and-

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[7] *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) ("[P]unitive damages are quasi-criminal punishment. Unlike compensatory damages ... punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award.").

convincing standard to be appropriate. *Addington*, 441 U.S. at 424; see *supra* at 22.

Indeed, this Court has expressed concern about the fact that punitive damages are quasi-criminal in nature but unaccompanied by the usual criminal procedural protections. *E.g.*, *State Farm*, 538 U.S. at 417. To that end, it has expressly endorsed the application of the clear-and-convincing standard to punitive damages awards: "There is much to be said in favor of a State's requiring ... a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt,' as in the criminal context." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 n.11 (1991) (citations omitted).

Not only is the decision below flatly incompatible with this Court's precedents; it is also contrary to the overwhelming trend in the States. As the Sixth Circuit dissenters recognized, when § 1981a was enacted in 1991, 21 of 29 States to have considered the issue required proof of punitive damages by at least clear and convincing evidence in all cases, and two more States required it in certain cases. Pet. App. 62a-65a (Sutton, J., dissenting). The strength of that trend is clear from where the States stand now: Today, 31 of the 34 States to have considered the question require a heightened standard. *Id.* at 73a-77a. This is of no small concern; this Court has looked to state standards of review in seeking to identify federal standards. *Addington*, 441 U.S. at 431-32. Moreover, both the American Bar Association and the American Law Institute have recommended the clear-and-convincing standard for punitive damages. See Special Comm. on Punitive Damages, *Punitive Damages: A Constructive Examination*, 1986 A.B.A. Sec. Litig. 33; 2 American Law Inst., *Reporters' Study: Enterprise Responsibility for Personal Injury* 264 (1991). Important for purposes of interpreting the statute, both the ABA and ALI recommendations preceded the enactment of § 1981a. There is no warrant for the Sixth Circuit's claim that congressional silence should be treated as adopting an archaic rule allowing punitive damages to be

awarded on a mere preponderance of the evidence. See Pet. App. 28a.

2. The decision to authorize the plaintiff to receive extraordinary relief upon a meager standard of proof was error enough to merit this Court's review, but this mistake was badly compounded by the remedial order—that the district court should "conduct a new trial on the issue of punitive damages *only*." Pet. App. 34a (emphasis added); see also *id.* 125a-126a (reaffirming this ruling). That ruling conflicts with precedents of both this Court and the Fifth Circuit.

The decision to remand for a retrial solely on punitive damages cannot be reconciled with this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). There, the Court considered the circumstances under which the Seventh Amendment permits a partial retrial on only certain issues. Specifically, it addressed whether a retrial on damages also required a retrial of the underlying counterclaim. *Id.* at 499. In so doing, the Court held that "a partial new trial ... may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. And, it concluded in that case that "the question of damages ... is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

The Fifth Circuit, similarly, has properly recognized the close relationship between liability and punitive damages in Title VII cases, and accordingly has refused to permit the sort of limited remand that was ordered here. In *Hardin* v. *Caterpillar, Inc.*, it declined to permit a retrial on punitive damages only, because a "jury's decision on the claim of punitive damages [is] intertwined with its view of the facts determin-

ing liability." 227 F.3d 268, 272 (5th Cir. 2000).[8] That analysis is consistent with *Gasoline Products*, and in this regard, it too conflicts with the decision below, providing yet one more reason that certiorari should be granted.

The implications of this rule in the Title VII context are clear: a partial retrial on punitive damages alone is impermissible because the evaluation of whether any punitive damages are warranted is inseparably intertwined with underlying issues of liability. A jury considering the propriety of a punitive damage award in a Title VII case must consider whether the defendant can show that the employer "engaged in unlawful intentional discrimination," 42 U.S.C. § 1981a(a)(1), and did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," *id.* § 1981a(b)(1). This standard requires proof of "'conscious wrongdoing,'" such that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 536, 538 (1999) (internal quotation marks omitted). The factual questions of conduct and the defendant's "state of mind" in engaging in that conduct, *id.* at 535, are inseparable and cannot be split between two juries, for it would be impossible for a second jury assessing state of mind to know precisely what facts concerning conduct were found by the first jury. Accordingly, to resubmit conduct-related facts to a new jury to decide anew on remand is to invite an unlawful reexamination of the facts underlying the original jury's verdict.

The Sixth Circuit, however, did not apply the *Gasoline Products* test even though a stand-alone trial is clearly inap-

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[8] *Accord* 227 F.3d at 272 ("A jury deciding whether to award punitive damages and their amount responds to the evidence of intentional acts essential here to the underlying finding of liability."); *see also Western Fireproofing Co.* v. *W.R. Grace & Co.*, 896 F.2d 286, 293-94 (8th Cir. 1990) (requiring a full remand in a fraud case because of the close connection between liability and punitive damages).

propriate. Indeed, although punitive damages are almost always intertwined with a determination of liability because they rest on jury findings regarding the defendant's conduct, see *State Farm*, 538 U.S. at 419; *Kolstad*, 527 U.S. at 535-38, that is particularly so in this instance, where the plaintiff presented alternative theories of liability to the jury on retaliation, but no interrogatories were submitted to determine on which ground the verdict rested. Under the Sixth Circuit's standard, the jury verdict on retaliation could have rested on either the suspension *or* the reassignment of White from forklift duty, but there is no basis for knowing which facts the jury found. Thus, the second jury in a standalone punitive damages retrial cannot be instructed as to which conduct attributable to BNSF it should evaluate for malice or reckless indifference. There is thus a substantial risk of inconsistent jury verdicts; the second jury may punish BNSF for conduct that was not the basis of its retaliation liability in the first trial. If White desires a new trial because of error in the punitive damages instruction, the only proper and just result under *Gasoline Products* is for the court of appeals to grant a complete new trial.

* * * *

The decision below exacerbates a three-way, 12-circuit conflict of authority that cries out for this Court's intervention. There is no possibility that the conflict will be resolved in the lower courts, and in the meantime, it has spread uncertainty and confusion into related areas of law. The decision below, moreover, errs as to two critical questions concerning the proper application of punitive damages. For all of these reasons, this case is an excellent vehicle for bringing much-needed certainty to multiple areas of federal law under Title VII that affect core primary conduct of employers and thus warrant uniform rules of law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 00-6780, 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Defendant-Appellant/Cross-Appellee.

Argued June 11, 2003.
Decided and Filed April 14, 2004.

Before: BOGGS, *Chief Judge*; MARTIN, KRUPANSKY, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, *Circuit Judges*.

GIBBONS, J., announced the judgment and majority opinion of the en banc court on all issues. The entire en banc court joined Parts I (Background) and III (Attorney's Fees) of the majority opinion. Part II (Adverse Employment Action) of the majority opinion was joined by BOGGS, C. J., and KRUPANSKY, BATCHELDER, GILMAN, ROGERS, SUTTON, and COOK, JJ., and Part IV (Punitive Damages) was joined by MARTIN, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, and COOK, JJ. CLAY, J. (pp. 808-17), filed a separate concurring opinion joining Parts I, III, and IV of the majority opinion and writing separately as to Parts II and V, in which he was joined by MARTIN, DAUGHTREY, MOORE, and COLE, JJ. SUTTON, J. (pp. 817-42), filed an

opinion concurring in Parts I-III and dissenting from Parts IV and V, in which he was joined by BOGGS, C. J., and KRUPANSKY, BATCHELDER, and ROGERS, JJ.

GIBBONS, *Circuit Judge.*

In this appeal, the *en banc* court addresses the meaning of "adverse employment action" for purposes of Title VII. We decide that a thirty-seven day suspension without pay constitutes an adverse employment action regardless of whether the suspension is followed by a reinstatement with back pay. We also address several other issues raised by this appeal.

Sheila White brought this action against her employer, Burlington Northern & Santa Fe Railway Company (Burlington Northern), alleging sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3. The jury returned a verdict in favor of Burlington Northern on the sex discrimination claim and in favor of White on the retaliation claim. The jury awarded White compensatory damages but no punitive damages. After the trial, the district court denied Burlington Northern's motion for judgment as a matter of law on the retaliation claim and granted White's motion for attorney's fees.

Burlington Northern appeals from the denial of its motion for judgment as a matter of law and from the award of attorney's fees to White. White cross-appeals, challenging the district court's jury instruction regarding punitive damages. For the reasons set forth below, we affirm the district court's denial of Burlington Northern's motion for judgment as a matter of law and the district court's award of attorney's fees to White. We conclude, however, that the district court erred in instructing the jury on the issue of punitive damages, and therefore we remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

Before June 1997, Ralph Ellis operated the stationary forklift for Burlington Northern at its Tennessee Yard in Memphis. In June 1997, Ellis resigned from the forklift position in order to work on a mobile track gang, in which position Ellis earned more pay than he would have if he had continued working in the forklift position. Marvin Brown, roadmaster of the Tennessee Yard, interviewed White for a job with Burlington Northern and expressed interest in White's experience operating a forklift. On June 23, 1997, Burlington Northern hired White to work in its Maintenance of Way department at its Tennessee Yard, and following White's hire, Brown assigned her to operate the forklift at the Tennessee Yard.

White was the only female working in the Maintenance of Way department at the Tennessee Yard. White's immediate supervisor was foreman Bill Joiner. Joiner had never supervised a woman before, and he admitted at trial that he treated White differently because of her gender. He also admitted that he did not believe that the Maintenance of Way department was an appropriate place for women to work. According to White, Joiner repeatedly expressed this belief to her while she was working under his supervision. According to Joiner, several other Burlington Northern employees also expressed the belief that women should not work on a railroad. Another Burlington Northern employee agreed at trial that there was "a general anti-woman feeling" among Burlington Northern employees at the Tennessee Yard.

Despite concerns about the propriety of a woman working on the railroad, the evidence was uncontradicted that White did not have difficulty performing her job. According to Brown, he never received a complaint regarding White's performance operating the forklift. Joiner testified that White had no problems performing her job. Furthermore, another Burlington Northern foreman testified that no one expressed

concern about White's ability to get along well with others in the workplace or about anything specific to White other than her gender.

On September 16, 1997, White complained to Brown and other company officials about specific incidents of alleged sexual harassment committed by Joiner. The company investigated. Following the investigation, Burlington Northern suspended Joiner for ten days and ordered him to attend a training session regarding sexual harassment.

On September 26, 1997, Brown met with White to inform her that Joiner had been disciplined pursuant to her complaint. He also, however, told her that the company had learned during the investigation of several complaints about her working in the forklift position. According to Brown, the complaints did not relate to her performance but related to the fact that the forklift position was a less arduous and cleaner job than other track laborer positions. Brown testified that other employees, including Ellis, complained about a junior employee being allowed to work the forklift instead of "a more senior man." Other witnesses testified that the forklift job was generally considered a physically easier and cleaner job than other track laborer positions, although it required more qualifications. Joiner testified that other track laborers complained about White being allowed to hold the position instead of a male employee.

During the September 26 meeting regarding the resolution of White's internal sexual discrimination complaint, Brown informed White that he was removing her from the forklift position and assigning her to a standard track laborer position because of her coworkers' complaints. Her pay and benefits remained the same, but her new job was, by all accounts, more arduous and "dirtier" than the forklift position. Brown replaced White with Ellis, the only other employee qualified to perform the forklift job. Brown admitted at trial that he had heard complaints about White being allowed to work the

forklift before she complained of discrimination but that he did not remove her from the position until after she complained of discrimination.

Brown's trial testimony is inconsistent with Burlington Northern's interrogatory response. In that response, the railroad stated that it removed White from the forklift position because a more senior employee claimed the job according to the collective bargaining agreement. Brown, however, testified at trial that the forklift job was not governed by the collective bargaining agreement and that he had the discretion to place anyone he chose in that position regardless of seniority. Moreover, neither the union, nor anyone else, initiated a grievance about White's operation of the forklift. A union official testified that the union's records did not reflect any complaints regarding White's assignment to the forklift position. Only White and Ellis were qualified to perform the forklift position. Ellis, who had voluntarily resigned from the forklift job for a higher-paying job, testified that he did not complain to Brown or anyone else about White operating the forklift and that he did not request that he be returned to the position.

On October 10, 1997, White filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination and retaliation. She filed a second charge with the EEOC on December 4, 1997, alleging retaliation. In her second EEOC charge she alleged that Brown had placed her under surveillance and was checking on her daily activities. Her second EEOC charge was mailed to Brown on December 8, 1997.

On December 11, 1997, White was working in Blytheville, Arkansas, supporting a regional tie gang. She was working under the supervision of Burlington Northern foreman Percy Sharkey. At some point during the day, Sharkey instructed White to ride in a truck with another foreman, James Key. Sharkey instructed another track laborer, Greg Nelson, to ride

with him in his vehicle. According to White, when she approached Key he told her that she had to ride with Sharkey because Key wanted Nelson to ride with him. Against Sharkey's order, Nelson rode away with Key. White testified that Sharkey became very upset when she returned and told him that Nelson had ridden away with Key and that she would have to ride with him. Contrary to White's testimony, Sharkey testified that White refused to ride with Key, claiming that she had seniority over Nelson and insisting upon riding with Sharkey.

According to Sharkey, he called Brown to discuss the situation and Brown told him that, based on Sharkey's description of events, White had been insubordinate and should be removed from service immediately. On the afternoon of December 11, Sharkey informed White that she was suspended. Although Sharkey had the authority to suspend White himself, Sharkey testified that Brown made the decision to suspend White. Brown testified that Sharkey made the decision. White testified that Sharkey told her at the time that Brown had instructed him to suspend her. In a letter to the EEOC, Burlington Northern stated that Brown made the decision, but Brown testified that this letter was incorrect. Nelson received no discipline, although Sharkey acknowledged at trial that Nelson had disobeyed his direct order.

White testified that Sharkey had told her at some point before her suspension that Brown considered White a "troublemaker." Sharkey acknowledged at trial that he had told White that the railroad was trying to "get rid" of her.

The decision to suspend White occurred seven days after White filed her second EEOC charge and three days after the charge was mailed to Brown. The suspension took effect immediately and was without pay. According to company policy, the suspension without pay would automatically become a termination if White did not file a grievance with her union appealing the decision within fifteen days. White

timely filed such a grievance and also filed another EEOC charge on December 15, 1997, alleging retaliation.

While her grievance was pending, White was without a job and without income and she did not know if or when she would be allowed to return to work. During this period, White sought medical treatment for emotional distress and incurred medical expenses. The grievance remained pending through the end of December and the first half of January 1998. After an investigation and a hearing, the hearing officer, who was a Burlington Northern manager, found that White had not been insubordinate and that she should not have been suspended. After being suspended without pay for thirty-seven days, White was reinstated to her position with full back pay on January 16, 1998.

After exhausting her avenues for relief before the EEOC, White filed this action against Burlington Northern in the district court, alleging sex discrimination and retaliation in violation of Title VII. A jury trial was conducted from August 29, 2000, to September 5, 2000. The jury returned a verdict in favor of Burlington Northern on White's sex discrimination claim and a verdict in favor of White on her retaliation claim. The jury awarded White $43,500 in compensatory damages, including $3,250 in medical expenses, on her retaliation claim. The jury found against White on her claim for punitive damages. After the trial, pursuant to Federal Rule of Civil Procedure 50(b), Burlington Northern filed a renewed motion for judgment as a matter of law on the retaliation claim, which the district court denied. White filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 2000e-5(k), and the district court awarded White $54,285, which represented eighty percent of White's total attorney's fees.

II. MOTION FOR JUDGMENT AS A MATTER OF LAW

We first review the district court's denial of Burlington Northern's post-trial motion for judgment as a matter of law pursuant to Rule 50(b). Our standard of review is *de novo*. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir.2001). The inquiry for resolving a motion for judgment as a matter of law pursuant to Rule 50 is the same as the inquiry for resolving a motion for summary judgment pursuant to Rule 56. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). We review all of the evidence in the record in the light most favorable to the nonmoving party and determine whether there was a genuine issue of material fact for the jury. *Gray*, 263 F.3d at 598.

We must affirm the jury verdict unless there was "no legally sufficient evidentiary basis for a reasonable jury to find for [the prevailing] party." Fed.R.Civ.P. 50(a). We draw all reasonable inferences in favor of the prevailing party, and we do not make any credibility determinations or weigh the evidence. *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097. Therefore, we "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151, 120 S.Ct. 2097. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Burlington Northern contends that it is entitled to judgment as a matter of law on White's retaliation claim because, according to Burlington Northern, neither White's transfer from the forklift job to a standard track laborer job nor her suspension without pay for thirty-seven days constitutes an

adverse employment action for purposes of Title VII. In the alternative, Burlington Northern contends that there was insufficient evidence for the jury to conclude rationally that Burlington Northern's asserted legitimate, non-discriminatory reasons for transferring and suspending White were pretexts for retaliation.

In determining whether Burlington Northern is entitled to judgment as a matter of law, we first discuss the meaning of "adverse employment action" for purposes of Title VII. Then we discuss whether White's transfer and suspension were adverse employment actions. Finally we address whether there was sufficient evidence for the jury to rationally find that Burlington Northern's asserted legitimate reasons were pretexts for unlawful retaliation.

A. Defining Adverse Employment Action

Title VII's anti-retaliation provision provides:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (section 704(a) of Title VII) (emphasis added). Title VII does not define the phrase "discriminate against," which is repeated in Title VII's other anti-discrimination provisions, but courts have made clear that not just any discriminatory act by an employer constitutes discrimination under Title VII. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633

(1998) (citing cases requiring a "tangible employment action" to support a Title VII claim). Employment actions that are *de minimis* are not actionable under Title VII. *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir.2000). "If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure." *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir.1999).

To prevent lawsuits based upon trivial workplace dissatisfactions, we require that a plaintiff prove the existence of an "adverse employment action" to support a Title VII claim. *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999) (defining "adverse employment action" as a "materially adverse change in the terms and conditions of [plaintiff's] employment").[1] This case requires us to clarify further the meaning of "adverse employment action" for purposes of Title VII.

The first time this court required a plaintiff to prove the existence of an "adverse employment action" as part of a Title VII claim was in *Geisler v. Folsom*, 735 F.2d 991 (6th Cir.1984). In *Geisler*, the plaintiff alleged that her employer violated Title VII's anti-retaliation provision by discrim-

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[1] Although this court and most other courts use the term "adverse employment action," some courts, including the Supreme Court, use the term "tangible employment action" or some other variation for the same concept. *See, e.g., Burlington Indus.*, 524 U.S. at 761, 118 S.Ct. 2257 ("tangible employment action"); *Bowman*, 220 F.3d at 461 n. 5 ("Courts use the terms 'tangible employment detriment' and 'materially adverse employment action' interchangeably.").

As the one alternative to showing the existence of an adverse employment action, a plaintiff may support a Title VII claim by showing that "plaintiff was subjected to severe or pervasive retaliatory [or other discrimination based] harassment by a supervisor." *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir.2000). What constitutes severe or pervasive harassment is not at issue in this appeal.

inating against her for filing a sex discrimination charge with the EEOC. After a bench trial, the district court found that "[p]laintiff failed to show any adverse employment action in response to her EEOC charge or any other protected activity. While additional tension arose after others became aware of [plaintiff]'s charge, such 'predictable tension' is not 'the type of adverse employment action prohibited by Title VII's retaliation clause.'" 735 F.2d at 994 (quoting the district court). This court affirmed, stating:

> We agree with the district judge that a general increase of tension in the workplace would be expected to follow revelation that a claim of discrimination in employment had been filed. However, evidence of such an increase should be considered, and any discrete act or course of conduct which could be construed as retaliation must be examined carefully. After such examination we conclude that the finding that no 'adverse employment action' resulted from the filing of the EEOC charge is not clearly erroneous, particularly in view of the contrary evidence. . . .

735 F.2d at 996 (quoting the district court's use of the phrase "adverse employment action").

A few months after deciding *Geisler*, this court stated that to support a claim for retaliation under Title VII a "plaintiff must establish: (1) that he engaged in activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a casual [sic] link between his protected activity and the adverse action of his employer." *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir.1984). The *Jackson* court did not cite *Geisler* as a basis for including "adverse employment action" among the elements of a Title VII retaliation claim; instead it relied upon cases from the Fifth, Tenth, and Eleventh Circuits. *Id.* (citing *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.1982); *Jones v. Lumberjack Meats, Inc.*, 680 F.2d

98, 101 (11th Cir.1982); *Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir.1980)). The cases cited by *Jackson*, like *Jackson* itself, each involved a termination of employment, and so none of these cases addressed the issue of what types of employment actions short of termination constitute adverse employment actions.[2]

Ever since *Geisler* and *Jackson*, the adverse-employment-action element has remained a part of a Title VII claim in this circuit. After *Geisler*, the first time that this court decided a case based on the adverse-employment-action element was in *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.1987). In *Yates*, this court reversed a district court's factual finding of retaliation, holding that it was clear error for the district court to find that a temporary job reassignment that resulted in no pay or benefits reduction was an adverse employment action cognizable under Title VII's anti-retaliation provision. For this holding, the *Yates* court relied solely upon a district court decision from Delaware. *Id.* (citing and endorsing *Ferguson v. E.I. duPont deNemours and Co.*, 560 F.Supp. 1172, 1201

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[2] The decisions cited by *Jackson* from the Tenth and Eleventh Circuits, *Burrus* and *Jones*, both cite *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir.1981), which in turn cites *Whatley* as the basis for including "adverse employment action" among the elements of a Title VII claim. *Whatley* cites a treatise published in 1976. 632 F.2d at 1328 (citing B. Schlei & P. Grossman, Employment Discrimination Law, Ch. 15 (1976)). It appears that the inclusion of "adverse employment action" as an element of a Title VII claim originated with the treatise cited by *Whatley*. *See Williams v. Boorstin*, 663 F.2d 109, 120 (D.C.Cir.1980) (J. Bazelon, concurring) (stating that "adverse employment action" is among the elements of a Title VII retaliation claim under "the standard found in B. Schlei & P. Grossman. Employment Discrimination Law 436 (1976)"). The first reported case in the nation to include "adverse employment action" as an element of a Title VII claim was decided the year after publication of the treatise. *EEOC v. Locals 14 and 15 Int'l Union of Operating Eng'rs*, 438 F.Supp. 876, 881 (S.D.N.Y.1977).

(D.Del.1983), which held that a job reassignment is not an adverse employment action if it is only temporary and results in no reduction in pay or benefits).

After *Yates*, it was almost ten years before we had another opportunity to develop the definition of adverse employment action. In *Kocsis v. Multi-Care Management Inc.*, this court considered the definition of adverse employment action in the context of a discrimination claim under the Americans with Disabilities Act. 97 F.3d 876, 885-87. Relying in part upon the Seventh Circuit's definition, this court held that a plaintiff claiming employment discrimination must show that she suffered "a materially adverse change in the terms of her employment." *Id.* at 885 (citing *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883 (7th Cir.1989), which involved an age discrimination claim). A "mere inconvenience or an alteration of job responsibilities" or a "bruised ego" is not enough to constitute an adverse employment action. *Id.* at 886 (citing *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir.1993), and *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir.1994)).

Furthermore, according to *Kocsis*, "reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Id.* at 885 (citing *Yates*, 819 F.2d at 638, which applied to "temporary" reassignments). A reassignment without salary or work hour changes, however, may be an adverse employment action if it constitutes a demotion evidenced by "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* at 886 (citing *Crady*, 993 F.2d at 136).

In this circuit, *Kocsis* is the seminal case for defining adverse employment action.[3] The Supreme Court in *Burlington Industries v. Ellerth* relied upon *Kocsis* and several decisions from other circuits when it stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). The Supreme Court also observed that:

> A tangible employment action in most cases inflicts direct economic harm. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

Id. at 762, 118 S.Ct. 2257. *But see Ray v. Henderson*, 217 F.3d 1234, 1242 n. 5 (9th Cir.2000) (rejecting the contention that *Burlington Industries* set forth a standard for adverse employment actions in the retaliation context).

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[3] For instance, in *Hollins v. Atlantic Co.*, this court relied upon *Kocsis* to decide that an employee had not suffered an adverse employment action when she received lower ratings in a performance evaluation. 188 F.3d 652, 662 (6th Cir.1999). The *Hollins* court held that lower ratings were not enough in the absence of "evidence to show that the lowered performance ratings actually had an effect on her wages such that a court may conclude that there was a materially adverse employment action." *Id.* In *Bowman v. Shawnee State University*, this court relied upon *Kocsis* and *Hollins* to hold that the temporary removal of a university instructor from his position as the Coordinator of Sports Studies did not rise to the level of an adverse employment action. 220 F.3d 456, 461-62 (6th Cir.2000). The *Bowman* court focused on the facts that the removal was for only ten days, the employee maintained his position as a full-time university instructor, and he never lost any income. *Id.*

In this appeal, White and the EEOC, which has filed an *amicus curiae* brief on White's behalf, urge us to revise our definition of adverse employment action for purposes of Title VII retaliation cases and adopt the interpretation included in the EEOC Guidelines. The EEOC has interpreted "adverse employment action" in the context of a Title VII retaliation claim to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 (1998). Although EEOC Guidelines are not binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

The EEOC claims that this court's development of the adverse-employment-action element has been unfaithful to the letter and purpose of Title VII's anti-retaliation provision. According to 42 U.S.C. § 2000e 3(a), it is unlawful for an employer to "discriminate against" an employee for engaging in protected conduct. The EEOC contends that the most natural reading of this language is that it prohibits "any form of discrimination" against an individual for opposing discrimination or filing a charge. The Ninth and Seventh Circuits have also embraced a broad interpretation of Title VII's anti-retaliation provision. *See Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000) ("This provision does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination."); *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996) ("There is nothing in the law of

retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint.").[4]

Despite the EEOC's contention that "any form of discrimination" falls within the most natural reading of the statute, the EEOC acknowledges in its brief that its definition of adverse employment action excludes "petty slights and trivial annoyances" and anything that is not reasonably likely to deter employees from engaging in protected activity. The EEOC does not explain how it justifies excluding such discriminatory acts under its strictly literal reading of the statute, which prohibits discrimination without any explicit textual limitation regarding the type of discrimination or level of severity required. Therefore, the EEOC admits that a strictly literal reading of "discriminate against" is not a fair interpretation of Title VII since it is unlikely that Congress intended to authorize Title VII claims over trivial matters.

We developed the adverse-employment-action element to prevent the kind of claims based upon trivial employment actions that a strictly literal reading of Title VII's anti-retaliation provision would allow. Because the language of Title VII does not explicitly provide any limit on the types of discriminatory acts prohibited, the language of Title VII does not favor the EEOC's proposed limitations over the limitations this court has developed during the last twenty years of defining the adverse-employment-action element of a Title VII claim.

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[4] We have recognized that the dictionary definition of "discriminate" is "to distinguish; to make distinctions in treatment; show partiality or prejudice." *Mattei v. Mattei*, 126 F.3d 794, 804 (6th Cir.1997) (quoting Webster's New World Dictionary); *see also* Oxford English Dictionary (2d ed.1989) ("to discriminate against: to make an adverse distinction with regard to; to distinguish unfavorably from others").

The EEOC argues that the purpose of Title VII's anti-retaliation provision supports its definition. "In enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir.1993). While the EEOC's proposed definition more overtly incorporates the purpose of Title VII's anti-retaliation provision, this court's definition, properly interpreted, also accomplishes the goal while appropriately counterbalancing the need to prevent lawsuits based upon trivialities. Instead of requiring district courts to determine on a case-by-case basis what actions by an employer are reasonably likely to deter an employee from engaging in protected activity, we have over the last twenty years given some shape to the definition by describing the kinds of material adverse employment actions that rise above the level of trivial. As we recognized in *Kocsis*, however, it is impossible to list every possible employment action that falls into the definition of adverse employment action and a court must consider "indices that might be unique to a particular situation." *Kocsis*, 97 F.3d at 886.

In addition, this court's definition has the benefit of applying equally to all Title VII discrimination claims, not only to retaliation claims. Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase "discriminate against" in each of its anti-discrimination provisions. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir.2000) (applying rules of statutory construction to hold that "discriminate against" means the same thing each time it appears in Title VII); *Mattei v. Mattei*, 126 F.3d 794, 806 (6th Cir.1997) (presum-

ing that Congress intended the phrase "discriminate against" to have the same basic meaning each time it is used in a statute).[5]

We therefore reject White's and the EEOC's request that we adopt a new definition of adverse employment action for purposes of Title VII retaliation cases, and we reaffirm the definition that we have developed in cases such as *Kocsis* and its progeny. Since the adverse-employment action element developed by this Circuit is an exception to a broad, strictly

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[5] Although both § 2000e-2(a)(1) and § 2000e-3(a) use the phrase "discriminate against," the former specifies that the prohibited discrimination must be "with respect to his compensation, terms, conditions, or privileges of employment," while the anti-retaliation provision contains no such language. The parties dispute whether this additional language is a limitation or an expansion of the conduct prohibited. We have never before distinguished between the types of conduct prohibited in the different provisions, and we do not do so here. We find it untenable to interpret the additional language as an expansion of prohibited conduct because "with respect to" is a phrase commonly used to limit. *But cf. Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 709 (5th Cir.1997) ("The anti-retaliation provision speaks only of 'discrimination'; there is no mention of the vague harms contemplated in § 2000e-2(a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions."). The D.C. Circuit and the United States District Court for the Northern District of Ohio have written well-reasoned opinions that conclude that the absence of the additional language from the anti-retaliation provision means that an employer is prohibited from retaliating in materially adverse ways, regardless of whether the retaliatory acts affect employment. *Passer v. American Chem. Soc.*, 935 F.2d 322, 330-31 (D.C.Cir.1991) (holding that an employer's cancellation of a major public symposium in former employee's honor could be an act of retaliation under a statute that parallels Title VII's anti-retaliation provision); *EEOC v. Outback Steakhouse of Florida, Inc.*, 75 F.Supp.2d 756, 758-60 (N.D.Ohio 1999) (holding that Title VII's anti-retaliation provision is not limited to discrimination affecting employment). It is unnecessary for us to resolve the question addressed in *Passer* and *Outback Steakhouse* because the actions at issue in the present case (job transfer and suspension) clearly affect employment.

literal reading of Title VII's anti-discrimination provisions, we will continue to define the exception narrowly so as not to frustrate the purpose of Title VII while deterring lawsuits over trivial matters.

B. Suspension Without Pay

We now apply our definition of adverse employment action to the actions at issue in the present case. We consider the suspension first. Burlington Northern argues that a suspension without pay, followed thirty-seven days later by a reinstatement with back pay, is not an adverse employment action. For this argument, Burlington Northern primarily relies upon *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir.1999).

In May 1994, a Vanderbilt University dean denied tenure to Professor Dobbs-Weinstein and advised her that her teaching appointment at Vanderbilt would end on August 31, 1995. *Id.* at 543. Dobbs-Weinstein filed an internal grievance with Vanderbilt, alleging gender and national-origin discrimination among other things, and in May 1995, she filed an action under Title VII. *Id.* On August 31, 1995, her employment contract with Vanderbilt ended. *Id.* at 544. In November 1995, while her lawsuit was still pending, the Vanderbilt Board of Trustees reversed the decision of the dean and rehired her as a tenured professor. *Id.* The board also granted her back pay to account for the delayed promotion and the period of unemployment. *Id.* Dobbs-Weinstein persisted with her lawsuit, however, seeking interest on the back pay and compensation for emotional distress and injury to reputation. *Id.*

Despite the facts that she was initially denied tenure and her employment ended temporarily, this court held that Dobbs-Weinstein had not suffered an adverse employment action cognizable under Title VII. *Id.* at 545. We recognized that "'tenure decisions in an academic setting involve a

combination of factors which tend to set them apart from employment decisions generally.'" *Id.* (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir.1984)). We relied upon the fact that Vanderbilt reversed the decision of its dean and granted Dobbs Weinstein back pay as the result of its internal grievance procedure. *Id.* This reversal, we reasoned, was the "ultimate employment decision." *Id.* We held that "intermediate" tenure decisions that are appealable through a tenure review process cannot form the basis of a Title VII claim. *Id.* We did not, however, cite any section of Title VII that requires exhaustion of internal grievance procedures before one files a lawsuit.[6] Instead, we relied upon a decision from the Fourth Circuit, *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.1981), which we interpreted as holding that Title VII applies only to "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." *Id.* Neither the Fourth Circuit nor the *Dobbs-Weinstein* court, however, cited a statutory provision that limits Title VII's application to ultimate employment decisions.

Since deciding *Page*, the Fourth Circuit has retreated from the "ultimate employment decision" standard. *Von Gunten v. Maryland*, 243 F.3d 858, 865, 866 n. 3 (4th Cir.2001) (limiting *Page* and holding that "'ultimate employment decision' is not the standard in this circuit"). Furthermore, the majority of other circuits have either implicitly or explicitly rejected a standard limiting Title VII's reach to ultimate employment decisions. *See id.* at 864, 866 n. 4 (citing cases).

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[6] In fact, as will be mentioned again below, the Supreme Court has pointed out to this court before that internal grievance procedures and an action under Title VII are "legally independent" such that the statute of limitations on a Title VII claim is not tolled during the pendency of an internal grievance process. *Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) (reversing a Sixth Circuit decision).

Indeed, the only other circuits where this standard even arguably has any viability are the Fifth and the Eighth. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997) (applying the "ultimate employment decision" standard); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir.1997) (same).

The Fifth Circuit, however, has questioned whether the "ultimate employment decision" standard survived the Supreme Court's pronouncements in *Burlington Industries* regarding the definition of tangible employment action. *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 192-93 & n. 2 (5th Cir.2001) (pretermitting question); *but see Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir.2003) (applying "ultimate employment decision" standard without discussing *Burlington Industries* or *Fierros*). And while the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard. *See, e.g., Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir.1997) (ultimate employment decision includes "tangible change in duties or working conditions that constituted a material employment disadvantage"); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir.1997) (ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, "papering" of an employee's file with negative reports and reprimands even though employee was "not discharged, demoted, or suspended").

We now join the majority of other circuits in rejecting the "ultimate employment decision" standard.[7] First and fore-

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[7] We recognize that our decision in *Dobbs-Weinstein* was based in part upon the unique nature of "tenure decisions in an academic setting." 185 F.3d at 545. Other circuits also have acknowledged the unique nature of tenure decisions. *See Tanik v. S. Methodist Univ.*, 116 F.3d 775, 776 (5th Cir.1997); *Brousard-Norcross v. Augustana Coll. Ass'n*, 935 F.2d 974,

most, it is contrary to the plain language of Title VII, which provides that an employer must not "discriminate against" an employee based upon a prohibited classification. As this court has found, the words "discriminate against" literally mean "*any kind* of adverse action." *Mattei*, 126 F.3d at 805. Congress could have provided that employers shall not "discriminate against an employee when making ultimate employment decisions," but instead it chose to use the words "discriminate against" with no such qualifier.

Second, the employment action taken in the present case (suspension without pay for thirty-seven days) is not the type of employment action that this court developed the adverse-employment-action element to filter. The adverse-employment-action element is a warranted judicial interpretation of Title VII intended to deter discrimination lawsuits based on trivial employment actions, such as those that cause a "mere inconvenience" or a "bruised ego." *Kocsis*, 97 F.3d at 886. But as an exception to the strictly literal reading of the statute, the adverse-employment-action element of a Title VII lawsuit must not be interpreted too broadly. Taking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, it violates Title VII. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223-24 (2d Cir.2001) (holding that a suspension without pay for one week was an adverse employment action even though the employee was later reimbursed for lost wages because the employee "suffered the loss of the use of her wages for a time").

Third, the "ultimate employment decision" standard contravenes "the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment

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976 (8th Cir.1991); *Kumar v. Bd. of Trs., Univ. of Mass.*, 774 F.2d 1, 14 (1st Cir.1985); *Zahorik*, 729 F.2d at 92-93 (2d Cir.1984). Because we are not presented here with a denial of tenure, we do not decide to what extent our holding in *Dobbs-Weinstein* survives our decision in this case.

discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). While the standard ensures that a wrongfully suspended employee eventually receives back pay, it allows an employer unilaterally to cut off the employee's claims for other damages, which have been explicitly authorized by Title VII since the Civil Rights Act of 1991, such as interest on the back pay, attorney's fees, emotional suffering, and punitive damages. 42 U.S.C. §§ 1981a(b); 2000e-5(g), (k). Although Burlington Northern argues that it made White whole when it granted her back pay, Congress has declared that part of making a Title VII plaintiff whole is compensating her for interest on the back pay, attorney's fees, and emotional suffering. In this case, the jury found that White had suffered $43,500 in damages other than back pay due to Burlington Northern's retaliation.

Lastly, the "ultimate employment decision" standard is in tension with Supreme Court cases holding that the statute of limitations on a Title VII claim is not tolled during the pendency of an internal grievance process. *See, e.g., Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976). According to the Supreme Court, a Title VII claim arises on the date the alleged discriminatory decision occurs, even though an employee has challenged the decision via an internal grievance process. *Id.* at 234, 97 S.Ct. 441. The Supreme Court has rejected the argument that the pendency of an internal grievance process renders the employment decision "tentative" or "non-final" for purposes of Title VII. *Id.* The Supreme Court has also rejected the argument that "the danger of possible conflict between the concurrent pursuit of both collective-bargaining and Title VII remedies should result in tolling the limitations period for the latter while the former proceeds to conclusion." *Id.* at 239, 97 S.Ct. 441. The alleged discriminatory decision in the present case was the suspension without pay. White's election to challenge

this decision through an internal grievance process does not render the decision not actionable under Title VII.

The Equal Employment Advisory Council (the EEAC) argues in its *amicus curiae* brief on behalf of Burlington Northern that employers must maintain the prerogative to suspend summarily employees suspected of wrongdoing pending an investigation without facing the risk of Title VII liability. Otherwise, according to the EEAC, employers will be faced with the dilemma of either allowing potentially dangerous or disruptive individuals to remain in the workplace or suspending them pending an investigation, thereby risking Title VII liability.

In response to the EEAC's concerns, we initially note that an employer taking an adverse employment action against an employee, including a suspension without pay, only risks Title VII liability if there exists sufficient evidence to prove that the employer took the action based upon illegal discrimination. To the extent the EEAC's concerns for an employer's risk of Title VII liability are valid, however, they are allayed by *Jackson v. City of Columbus*, which holds that a suspension *with* pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action. 194 F.3d 737, 752 (6th Cir.1999). In *Jackson*, we held that there was no adverse employment action when a mayor effectively suspended with pay a police chief for four days pending an investigation of the police chief's alleged improper conduct in office. *See id.* at 744 (noting that the mayor referred to the suspension with pay of the police chief as a reassignment "to his residence").[8]

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[8] The National Employment Lawyers Association in its *amicus curiae* brief on behalf of White concedes that a suspension with pay pending a timely, good-faith investigation does not constitute an adverse employment action and recommends this course to employers concerned about possible misconduct.

C. Job Transfer

Next we consider whether the job transfer at issue in the present case was an adverse employment action. Burlington Northern appeals the district court's decision that transferring White from her forklift operator job to a standard track laborer job was an adverse employment action. We agree with the district court.

While the standard track laborer job paid the same as the forklift operator position, White's new position was by all accounts more arduous and "dirtier." Furthermore, the forklift operator position required more qualifications, which is an indication of prestige. *See Kocsis*, 97 F.3d at 886-87 (finding that the plaintiff had failed to show an adverse employment action because, among other things, her job reassignment did not entail any loss in prestige). According to Burlington Northern's own witnesses, the transfer occurred because the forklift operator position was objectively considered a better job and the male employees resented White for occupying it. In essence, as the district court found, the reassignment was a demotion evidenced by "indices . . . unique to [the] particular situation." *Kocsis*, 97 F.3d at 886; *see also Burlington Indus., Inc.*, 524 U.S. at 761, 118 S.Ct. 2257 (defining "tangible employment action" for purposes of Title VII liability as including a job "reassignment with significantly different responsibilities"); *Mattei*, 126 F.3d at 808 (stating that transferring an employee at the same salary to "some wretched backwater" is "clearly" actionable in a retaliation claim).

D. Evidence of Pretext

Having rejected Burlington Northern's arguments that there was no adverse employment action taken against White, we now address Burlington Northern's alternative argument in support of reversing the district court's denial of its motion for judgment as a matter of law. Burlington Northern appeals the district court's decision that there was sufficient evidence

from which the jury reasonably concluded that Burlington Northern's asserted legitimate, non-discriminatory reasons for removing White from the forklift position and then suspending her were pretexts for unlawful retaliation. We agree with the district court.

White presented to the jury substantial evidence to contradict Burlington Northern's asserted legitimate reasons, including contradictory statements from Burlington Northern's own officers. Burlington Northern asserted one reason for transferring White in its interrogatory response, but then Brown, the official who made the decision to transfer White, asserted a different, contradictory reason at trial. Furthermore, Brown testified that he transferred White in part based upon complaints from Ellis, but at trial Ellis denied complaining about White. Regarding the suspension, the evidence was not even consistent regarding who made the decision, much less the motivation for the decision. Brown testified that Sharkey made the decision to suspend White, while Sharkey testified that Brown made the decision. Burlington Northern asserts that Brown suspended White for insubordination, but another Burlington Northern official who served as a hearing officer for White's internal grievance concluded that White had not been insubordinate. White's second EEOC charge accused Brown of violating Title VII, and White was suspended three days after this charge was mailed to Brown.

Based upon all the evidence, including the contradictory evidence from Burlington Northern's own officers, the jury was entitled to find that Burlington Northern's asserted legitimate reasons were false and were pretext for unlawful retaliation. *See Reeves*, 530 U.S. at 147, 120 S.Ct. 2097 (holding that a jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability).

III. ATTORNEY'S FEES

Burlington Northern's last issue on appeal is a challenge to the amount the district court awarded White in attorney's fees. The district court awarded White eighty percent of her attorney's fees based on her degree of success in the lawsuit. Burlington Northern argues that White was not as successful as the district court found and that her attorney's fee award should be reduced.

We review a district court's determination regarding the amount of an award of attorney's fees under Title VII for an abuse of discretion. *Scales v. J.C. Bradford and Co.*, 925 F.2d 901, 909 (6th Cir.1991). "This deference, 'is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.'" *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Under Title VII, a district court has discretion to award a prevailing party "a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). In determining what constitutes a reasonable attorney's fee, the degree of success achieved in the lawsuit is a crucial factor. *Scales*, 925 F.2d at 910.

Although we may have awarded a different amount if we were considering the issue *de novo*, we do not find that the district court abused its discretion in awarding White eighty percent of her attorney's fees. White brought two claims in this lawsuit (sex discrimination and retaliation) but only prevailed on one (retaliation). As the district court correctly stated in its written decision, however, both of these claims arose from a common set of facts, and it would be difficult to divorce work done on one claim from work done on the other. In light of this consideration and others addressed by the district court in its decision, we find that the district court did not abuse its discretion in awarding White eighty percent of her attorney's fees.

IV. PUNITIVE DAMAGES

In her cross-appeal, White asserts that the district court erred in charging the jury on punitive damages. The district court instructed the jury that punitive damages may be considered if White showed by "clear and convincing" evidence that Burlington Northern acted "either intentionally, recklessly, maliciously, or fraudulently." The jury did not award White punitive damages. White contends that the appropriate burden of proof on a claim for punitive damages under Title VII is a preponderance of the evidence, not clear and convincing evidence. White is correct.

According to Title VII, "[a] complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (discussing what a plaintiff must prove to recover punitive damages under Title VII). Title VII is silent concerning the evidentiary standard for demonstrating malice or reckless indifference for purposes of a punitive damages claim. In the absence of more specific guidance, "[c]onventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality decision) (internal citation omitted); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 2154, 156 L.Ed.2d 84 (2003) (holding that Title VII's silence with respect to an evidentiary standard suggests that a conventional preponderance of the evidence standard applies).

Other circuits have reached this same conclusion with respect to punitive damages claims generally, *see Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282-83 (2d Cir.1990) (declining to apply a higher standard of proof than preponderance of the evidence for punitive damages award in products liability case because "such a change is best left for Congress or for higher judicial authority"); *In re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir.2001) (applying preponderance standard to award of punitive damages in maritime case because Congress has not legislated a higher standard), and with respect to punitive damages in Title VII suits, *see Karnes v. SCI Colorado Funeral Servs., Inc.*, 162 F.3d 1077, 1080-82 (10th Cir.1998) (concluding that a preponderance of the evidence standard is applicable to claims for punitive damages under Title VII); *Notter v. N. Hand Prot.*, 89 F.3d 829, 1996 WL 342008, at *10-11 (4th Cir. June 21, 1996) (rejecting argument that the standard of proof for punitive damages in Title VII case is clear and convincing evidence because "[i]n discrimination cases brought under federal law, punitive damages need be proven only by a preponderance of the evidence").

The dissenting opinion states that punitive damages are an unconventional form of relief and therefore deserve a heightened standard of proof. Unquestionably, punitive damages serve a different purpose than compensatory damages. The requirement that punitive damages be awarded only when a defendant acts maliciously or recklessly recognizes this difference in purpose and ensures that punitive damages will be awarded only in the most egregious cases. Punitive damages are not, however, unconventional in the sense that they are a new or nontraditional form of relief. In fact, punitive damages have a long history in American civil litigation, where the traditional standard of proof has been "preponderance of the evidence." *See generally Jury Determination of Punitive Damages*, 110 Harv. L.Rev. 1513, 1531-32 (1997) (recognizing that preponderance of the

evidence is the traditional civil standard of proof). *Cf. Smith v. Wade*, 461 U.S. 30, 53-56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (noting that "[t]here has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability" and rejecting actual malicious intent requirement for punitive damage award in § 1983 cases, even when underlying standard of liability for compensatory damages is recklessness).

The dissent, unable to point to any precedent imposing a higher standard of proof for Title VII punitive damages claims than preponderance of the evidence, also relies on authority not directly germane to the issue at hand. For instance, the dissent notes that, in recent years, public policy concerns, primarily about excessive punitive damage awards, have prompted many states to adopt a "clear and convincing" standard of proof for punitive damages. Trends at the state level, however, do not inform our consideration of punitive damages claims under the federal Title VII statute. In fact, the dissent's statistics indicate that, while many states applied a heightened standard of proof to state punitive damage claims at the time that Title VII was amended to permit such claims in 1991, a *majority* of states at that time chose not apply a heightened standard.

Moreover, to the extent that concerns about excessive punitive damage awards prompted the adoption of heightened standards of proof before or after 1991, those concerns do not exist under the Title VII statutory scheme. Under Title VII, damage awards—both compensatory and punitive—are capped, with $300,000 being the largest sum that can be awarded to a claimant against the largest employers, those with 500 or more employees.[9] 42 U.S.C. § 1981a(b)(3)(D).

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[9] The limits are lower for smaller employers, with the lowest limit being $50,000 for employers with 15-100 employees. 42 U.S.C. § 1981a(b)(3)(A)-(D).

The $300,000 limit is imposed on the sum of the compensatory and punitive damage awards; there is no separate limit for each type of damages. 42 U.S.C. § 1981a(b)(3). Thus, Title VII's own quite substantial restrictions on punitive damage awards guard against excessive awards.

Besides identifying trends at the state level, the dissent also cites cases that involve due process challenges to the application of a preponderance of the evidence standard of proof. Some of these cases concern situations wholly unrelated to punitive damages claims. *See Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (resolving, in the face of a due process challenge, the standard of proof required in a civil commitment hearing); *Santosky v. Kramer*, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (determining the standard of proof that due process demands in the context of a parental rights termination proceeding). Other cases cited by the dissent implicate a due process challenge to large punitive damage awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585 (2003); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). While the Supreme Court has found excessive punitive damages awards to be violative of due process, *State Farm*, 123 S.Ct. at 1526, the Court has specifically rejected the notion that the Due Process Clause requires a higher standard of proof for punitive damages claims than preponderance of the evidence. *Pacific Mut. Life Ins.*, 499 U.S. at 23 n. 11, 111 S.Ct. 1032. The sole bit of assistance derived from any of these cases is the Court's direct rejection in *Pacific Mutual* of the notion that the Constitution requires a standard of proof any higher than preponderance of the evidence for punitive damages claims.

The only case relied on by the dissent that could be instructive is *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), where the Supreme Court considered the

standard of proof for a deportation hearing. As in the instant case, the Court in *Woodby* was confronted with determining the standard of proof when "Congress has not addressed itself to the question of what degree of proof is required. . . ." *Id.* at 284, 87 S.Ct. 483. In *Woodby*, the Court held that for deportation proceedings, the standard of proof was "clear, unequivocal, and convincing evidence," *id.* at 286, 87 S.Ct. 483, which the dissent apparently references for the proposition that we should apply the same standard of proof here. While *Woodby* is helpful in its reminder that the judiciary has traditionally resolved the question of the proper standard of proof under a federal statute when Congress has not addressed the issue, *id.* at 284, 87 S.Ct. 483, it gives us no direction in this case. Its reasoning is based on the immediate hardship of deportation. Deportation, as an outcome of an administrative and judicial proceeding, bears little similarity to an award of damages, particularly an award under Title VII, which Congress has carefully restricted to limit its potential harm to employers.

Accordingly, in determining the proper standard of proof for a punitive damage claim under Title VII, we receive no specific guidance from the statutory language of the Act. Supreme Court precedent offers some assistance, however. Deriving that guidance from *Price Waterhouse* and *Desert Palace*—both of which specifically discuss standards of proof in Title VII cases—is more appropriate than looking to the Supreme Court's views on the standard of proof in dissimilar contexts or its stray comments about state or federal standards of proof in the course of deciding other issues. While there have been developments concerning the standard of proof for punitive damages claims at the state level, these trends do not support the conclusion that the "clear and convincing" standard applies to federal punitive damage claims under Title VII, which has its own limitations on punitive damage awards. Furthermore, as this case does not implicate a due process challenge to the size of a punitive damages award, or

to the standard of proof used in civil commitment hearings, hearings terminating parental rights, or in the context of deportation, we do not find the dissent's cited authority to be persuasive. Rather—in deciding the standard of proof to be applied to plaintiff's claim for punitive damages under Title VII—we choose to follow the guidance provided by the Supreme Court that "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253, 109 S.Ct. 1775.

Therefore, the district court erred when it instructed the jury that White must prove her case for punitive damages by clear and convincing evidence. The district court, however, also erred when it instructed the jury that White only needed to prove that Burlington Northern acted "either intentionally, recklessly, maliciously, or fraudulently." As noted above, a plaintiff seeking punitive damages under Title VII must prove that the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." This standard requires a plaintiff to prove more than merely intentional discrimination. *Kolstad*, 527 U.S. at 536-37, 119 S.Ct. 2118 (explaining standard). In addition, the Supreme Court has stated that only under certain conditions may an employer be vicariously liable for punitive damages under Title VII. *Id.* at 545, 119 S.Ct. 2118 (specifying conditions).

Finally, the dissent questions whether plaintiff has presented sufficient evidence to submit the punitive damages issue to a jury under either standard and would resolve the issue in defendant's favor without remand. While defendant argues generally that plaintiff's evidence was insufficient to permit an award of punitive damages, the parties did not analyze the evidence with any specificity under either potentially applicable standard of proof in their briefing to this court. Nor have we focused on the sufficiency of the evidence to permit a punitive damage award, since this was

not the reason we granted an *en banc* hearing. We cannot find that the evidence is insufficient on a damage issue simply because judicial officers may disagree on an issue relating to liability, as the dissent suggests. Rather, in order to decide whether a trier of fact could award punitive damages in this case, a careful examination of the entire record is required. This exercise is most appropriately undertaken in the first instance by the district court. If the district court determines on remand that the evidence is sufficient to support a claim for punitive damages under the standard announced by the Supreme Court in *Kolstad*, then the district court should conduct a new trial on the issue of punitive damages only.

V. CONCLUSION

For all these reasons, we affirm the district court's denial of Burlington Northern's motion for judgment as a matter of law and the district court's award of attorney's fees to White. We conclude, however, that the district court erred in instructing the jury on the issue of punitive damages, and therefore we remand the case for further proceedings consistent with this opinion.

CLAY, Circuit Judge, concurring.

I join Parts I, III, and IV of the majority opinion. I also agree with Part II insofar as it rejects the untenable "ultimate employment action" doctrine, concludes that Sheila White's removal from her forklift position and her thirty-seven-day suspension constitute adverse employment actions within the meaning of Title VII, and affirms the district court's denial of Burlington's Rule 50 motion. Although the majority properly rejected the "ultimate employment action" doctrine this court embraced in *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 545-46 (6th Cir.1999), I would be remiss if I failed to point out that such an express rejection of the "ultimate employment action" doctrine effectively overrules *Dobbs-Weinstein*. I write separately, however, because I disagree with the rule the majority today embraces with respect to what constitutes an adverse employment action within the meaning of Title VII's anti-retaliation provision, 42 U.S.C.2000e-3(a). Instead, I believe that the appropriate standard is the one articulated in the Ninth Circuit and advocated by the EEOC; i.e., an employer's retaliatory action is sufficiently adverse for § 704(a) purposes if it would be "reasonably likely to deter [employees] from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir.2000). The "reasonably likely to deter" standard is more consistent with § 704(a)'s statutory language and congressional intent, as well as Supreme Court case law.

A. Why the "Reasonably Likely to Deter" Rule is the Appropriate Standard for a Retaliation Case

1. Statutory and Case Law Support

The Supreme Court has repeatedly instructed courts, as a first step in interpreting a statute, "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808,

(1997). The inquiry is at an end "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). It is readily apparent from a reading of § 704(a) that Congress placed no limitations on the reach of the anti-retaliation provision.

Section 704(a) states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a). The word "discriminate," in turn, is not defined in Title VII, but the scope is impliedly quite broad. A review of other Title VII provisions is revealing, inasmuch as § 703(a) prohibits employers from "fail [ing] or refus[ing] to hire or to discharge any individual, or otherwise *to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Thus, both §§ 703(a) and 704(a) use the term "discriminate," but only the general discrimination provision (§ 703(a)) places limitations on the word "discriminate." Congress chose not to place any limitations on "discriminate" within the meaning of § 704(a). Thus, a straightforward reading of the § 704(a)'s plain text makes clear that there is no statutory support for the idea that a decision to undertake retaliatory action must materially affect the terms and conditions of employment in order to violate its proscriptions. Indeed, the most natural reading of this language is that it prohibits any form of discrimination against an individual for opposing discrimination or filing a charge, regardless of whether that discrimination takes the form of, for example, termination, suspension, lateral transfer, harassment, or discipline. At least some of the circuits have

expressly agreed. *Smith v. Sec'y of Navy*, 659 F.2d 1113, 1119 n. 56 (D.C.Cir.1981) (noting that the language of the anti-retaliation provision "speaks unconditionally" and is not "limit[ed] to acts causing particular harms such as the loss of a particular job or promotion"); *Ray*, 217 F.3d at 1243 (noting that language of the anti-retaliation provision "does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination"); *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory acts that might be visited upon an employee. . . .").

Incorporating by reference the limitations placed on "discriminate" in § 703(a) into "discriminate" in § 704(a) is altogether inappropriate. Such incorporation by reference is appropriate only when it is consistent with Congress' expressed intent. Section 704(a)'s legislative history is scant, and therefore we are left to look to its plain legislative text. Congress could quite easily have placed the same limitation on § 704(a) as it did on § 703(a), yet it chose not to do so. Congress' legislative intent, by all indications, was to remove all obstacles from an employee's ability to defend his or her Title VII rights by filing EEOC charges.

The Supreme Court, in *Russello v. United States*, confirmed its view against narrowly construing the meaning of a statute when the plain language unambiguously expressed its legislative purpose and intent. 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). In determining the proper applicability of the word "interest" as used in 18 U.S.C. § 1963(a)(1) in the context of a RICO case, the Supreme Court held that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23, 104 S.Ct. 296

(quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)). Specifically, in discussing the particular statutory provision at issue, the Court noted that "[t]he argument for a narrow construction of § 1963(a)(1) is refuted by the language of the succeeding subsection (a)(2). 'The former speaks broadly of 'any interest . . . acquired,' while the latter reaches only 'any interest in . . . any enterprise which [the defendant] has established[,] operated, controlled, conducted or participated in the conduct of in violation of section 1962.'" *Id.* (quoting 18 U.S.C. § 1962). The Court went on to express its belief that if Congress had intended to restrict § 1963(a)(1), it presumably would have done so expressly as it did in the immediately following subsection. *Id.*

Contrary to the majority opinion, this Court has already embraced this logic. In *Lynch v. Johns-Manville Sales Corp.*, we held that when looking to stay proceedings in a Chapter 11 bankruptcy context, a solvent co-defendant may not use the automatic stay provision in 11 U.S.C. § 362(a), when the said provision facially stays proceedings "against the debtor," and fails to suggest that these rights may be invoked by any one other than the defendant. 710 F.2d 1194, 1198 (6th Cir.1983). The Court noted "[it] is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent." *Id.* at 1197.

The Supreme Court case, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), views § 704(a)'s legislative intent in this manner. In *Robinson*, the plaintiff sued his former employer, alleging that it had retaliated against him by giving him a negative employment reference to a potential employer. *Id.* There was no allegation that the former employer itself had made an ultimate employment decision, or that it took any adverse action that materially altered the plaintiff's job responsibilities. (Indeed,

it could not have done so, given that the plaintiff was no longer working for the employer at the time.) Nevertheless, a unanimous Court allowed the plaintiff's claim to proceed after holding that former employees may challenge retaliatory actions. *Id.* at 346, 117 S.Ct. 843. Although *Robinson* dealt specifically with the issue of determining who is an "employee" for purposes of Title VII's anti-retaliation provision (as opposed to what constitutes an adverse employment action), its reasoning is pertinent: a former employee counts as an employee within the meaning of § 2000e-3(a), because otherwise an employee could be fired in retaliation and not be able to sue. In so holding, the Court noted that an alternative statutory interpretation would have undermined or vitiated one of Title VII's most important purposes—maintaining "unfettered access to statutory remedial mechanisms." *Id.*

In line with the teachings of *Robinson* and the Supreme Court's view that § 704(a) should not be limited in its construction, this Court, in *EEOC v. Ohio Edison*, also interpreted § 704(a) to be a broad anti-retaliation provision that should reach as far as its intended protections allow. 7 F.3d 541, 545-46 (6th Cir.1993) (holding that Title VII's protections against retaliation extended to situations where an employee was discriminated against because his representative opposed an unlawful employment practice). In reaching this result, we stated that "[i]n enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." *Id.* at *543*. We relied, in part, on the Supreme Court's analysis of statutory interpretation in *NLRB v. Scrivener*, which held that "the language of a statute should not be read strictly, but should 'be read more broadly' if such a reading was also consistent with the 'purpose and objective' of the prohibition made illegal by the statute." *Id.* at 545 (quoting *NLRB v. Scrivener*, 405 U.S. 117, 122, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972)).

Additionally in *Mattei v. Mattei*, this Court once again chose to interpret the Title VII's anti-retaliation provision broadly, as to prohibit *any kind* of adverse action. 126 F.3d 794, 798 (6th Cir.1997). There, we were asked to give meaning to the concept of discrimination as it is used in the Employee Retirement Income Security Act ("ERISA"). *Id.* The ERISA provision at issue was § 510 which made it unlawful, under certain circumstances, to "discriminate against" a participant or beneficiary. *Id.* at 797 (quoting 29 U.S.C. § 1140). The majority found guidance in Title VII's and the ADEA's interpretive use of the phrase "discriminate against," noting that neither of these Acts defined this phrase, but rather their respective provisions "are consistently interpreted . . . to forbid an employer to take *any kind* of adverse action against an individual because he has engaged in [ ] protected activity. . . ." *Id.* at 806 (emphasis in original). We concluded that because the ERISA anti-retaliation provision at issue used the same phrase ("discriminate against") as the Title VII and ADEA provisions, and was enacted after them, it was proper to assume that Congress intended for the ERISA provision "to have the same basic meaning." *Id.* at 806.

Even more recently, the Supreme Court has cautioned courts against unwarranted limitations on otherwise unambiguous statutory text. In *Desert Palace, Inc. v. Costa*, the Supreme Court rejected the approach of many circuits to limit a Title VII plaintiff's ability to receive a mixed-motive jury instruction in cases where direct evidence of discrimination had not been submitted at trial, determining that a "direct evidence" requirement "is inconsistent with the text of [42 U.S.C. § 2000e-2(m)]." 539 U.S. 90, 123 S.Ct. 2148, 2153, 156 L.Ed.2d 84 (2003). The Court reasoned, in pertinent part, that the § 2000e-2(m) "unambiguously states

that a plaintiff need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to 'any employment practice.'" *Id.* On its face, "the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Id.* The Court was further persuaded by a review of the term "demonstrates," which Title VII, as amended in the 1991 Civil Rights Act, defined as "to 'mee[t] the burdens of production and persuasion.'" *Id.* at 2154 (citing 42 U.S.C. § 2000e(m)). The Court added, "If Congress intended the term 'demonstrates' to require that the 'burdens of production and persuasion' be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in § 2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42." *Id.* at 2154. *Desert Palace* is instructive, inasmuch as it cautioned courts not to read limitations into statutory language, particularly where Congress expressly limited such terms in other provisions of the same title yet declined to do so in the presently reviewed statutory provision. We are faced with precisely the same situation. Section 703(a) expressly limited the scope of "discriminate" to actions relating to the employee's "compensation, terms, conditions, or privileges of employment." Section 704(a) could just as easily have limited its scope of "discriminate," yet chose not to do so. It is abundantly clear that the lessons of *Desert Palace* dictate that we not read such limitations into § 704(a) now.

2. Administrative Agency Support

In addition to support from the statutory text and Supreme Court case law, there is administrative agency support for the

"reasonably likely to deter" view, inasmuch as the EEOC has interpreted 42 U.S.C. § 2000e-3 in this manner. While it is true that the EEOC Compliance Manual on Retaliation is not binding authority, the guidelines nevertheless "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). It is persuasive authority. According to the EEOC, an "adverse employment action" means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998). Under this approach, a number of retaliatory actions which are not expressly encompassed in a "materially adverse" standard would fall into the ambit of a § 704(a) violation, so long as they are reasonably likely to deter employees from engaging in protected activity. The EEOC's test is not unlimited however, for instance, "petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity." EEOC Compliance Manual Section 8, "Retaliation," 8-14. As the Ninth Circuit observed, the focus is not on the "ultimate effects of each employment action," but rather on the "deterrent effects." *Ray*, 217 F.3d at 1243. Given the primary purposes of Title VII's anti-retaliation provision, this is where the emphasis properly lies.

3. Policy Considerations

From a policy (and logical) perspective, many factors support an interpretation of adverse employment action that extends beyond the boundaries of an employment decision that materially affects the terms and conditions of employment.

As noted above, a "materially adverse" standard would undermine the driving force behind § 704(a), which is to

maintain "unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346, 117 S.Ct. 843. This Court has similarly observed that Congress, in enacting Title VII's anti-retaliation provision, "'unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation.'" *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir.1993).

Indeed, the "materially adverse" rule would allow many types of retaliatory actions to go completely unaddressed and unpunished. For instance, the D.C. Circuit has held that negative job references to prospective employers and cancelling public events honoring an employee constitute retaliatory behavior, even though such retaliatory actions do not affect the terms and conditions of one's employment. *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir.1991). The "materially adverse" rule does not make clear whether such adverse behavior on an employer's part would fall within the ambit of § 704(a). It also seems to leave open the issue of retaliatory harassment. *See Causey v. Balog*, 162 F.3d 795, 803 (4th Cir.1998) (recognizing the validity of a § 704(a) retaliatory harassment claim).

Contrary to the majority's position, the Ninth Circuit's "reasonably like to deter" standard adequately addresses the many varied forms of retaliation while safeguarding against a slippery slope effect by disallowing employees from litigating trivial annoyances. The inquiry would not be whether any adverse action has been taken but whether, as a matter of law, the adverse action would deter a reasonable employee from engaging in protected activity. This ferrets out suits alleging frivolous harms, while maintaining suits for very deleterious actions such as supervisor harassment. Moreover, there are no indications that the broad rules still employed in the Ninth,

Tenth, and Eleventh Circuits[1] have opened unmanageable floodgates to aggrieved Title VII plaintiffs.

B. Why the Majority Opinion Incorrectly Rejected the "Reasonably Likely to Deter" Rule

Notwithstanding legislative, Supreme Court, and administrative support for a broad rule, the majority rejects the "reasonably likely to deter" standard, citing reasons that are less than persuasive. The majority suggests that the "reasonably likely to deter" standard is too broad. Yet the rule is no broader than the statutory language requires; nor is it any broader than that which is utilized in tort cases, which often involves a "case-by-case" analysis when compelling courts to employ a "reasonable person" standard in determining what constitutes a duty of care. The reasonable person standard is readily understandable, is not burdensome and is commonly used in legal discourse.[2]

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[1] *See Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir.1997) (holding that negative job references are actionable under § 704(a)); *Ray*, 217 F.3d at 1243; *Jeffries v. Kansas*, 147 F.3d 1220, 1231-32 (10th Cir.1998) (holding that, "[i]n recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action" and "takes a case-by-case approach to determining whether a given employment action is 'adverse'"); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir.1996) (construing Title VII's anti-retaliation provision to protect an employee from a malicious prosecution action brought by a former employer); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir.1998) (holding that negative job evaluations, demotions, suspensions, disadvantageous transfer and toleration of harassment may be actionable as a retaliation claim).

[2] *Cf. Morris v. Wal-Mart Stores, Inc.*, 330 F.3d 854 (6th Cir.2003) (holding, under Tennessee law, that the reasonable person standard is utilized to determine whether or not sufficient evidence exists when contemplating a directed verdict motion in a res ipsa loquitur negligence case); *U.S. v. Jones*, 335 F.3d 527 (6th Cir.2003) (employing a reasonable person standard when adjudicating the presence of apparent authority to determine whether entry was consensual in a Fourth Amendment context);

In fact, this Court, in *Thaddeus-X v. Blatter*, previously embraced such an objective standard which the majority now claims to be unreasonable. 175 F.3d 378, 396 (6th Cir.1999) (en banc). In *Thaddeus-X*, a case involving a § 1983 action brought by the state inmates against prison officials based on alleged retaliation, we adopted an objective standard in determining what constitutes an "adverse action." *Id.* at 396. In determining "whether actions of lesser severity merit being deemed 'adverse' for purposes of a retaliation claim, we adopt[ed] the standard suggested by Judge Posner in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir.1982), that an adverse action is one that would 'deter a person of ordinary firmness' from the exercise of the right at stake." *Id.* We reasoned that "[t]he benefits of such a standard are that it is an objective inquiry, capable of being tailored to the different circumstances in which retaliation claims arise, and capable of screening [out] the most trivial of actions from constitutional cognizance." *Id.* at 398.

Moreover, The Ninth, Tenth, and Eleventh Circuits all employ such an objective standard, specifically in the Title VII context, and by so doing, none of the Circuits appear to have had any difficulty in determining what is adverse and what is frivolous. *See, e.g., Doe v. Dekalb County School Dist.*, 145 F.3d 1441, 1449 (11th Cir.1998) (taking an "objective approach" to its case-by-case standard).

Furthermore, retaliation requires a broad rule because retaliation can take many forms, perhaps more than Congress at the time of its drafting could think of or reasonably anticipate. Nevertheless, it is not the function of this Court to graft its own policy values onto a statute; rather, it is this

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FiveCAP, Inc., v. National Labor Relations Board, 294 F.3d 768, 786 (6th Cir.2002) (employing the objective "reasonable person" standard when determining whether or not work conditions are so "unbearable" as to violate § 8(a)(3) of the National Labor Relations Act).

Court's responsibility to discern Congress' legislative intent in enacting the statute. In other words, we must determine whether Congress, not this Court, would envision a plaintiff like Sheila White receiving relief from the retaliatory actions allegedly perpetrated against her by Burlington Northern. Congress' intent is manifest: to provide employees who have been victimized by discrimination with access to appropriate statutory remedies under Title VII. *Robinson*, 519 U.S. at 346, 117 S.Ct. 843.

The majority's approach would utilize the same standard for §§ 703 and 704 so that it would not be necessary to undertake individual reviews under the separate sections of the statute when cases arise. This approach similarly is unavailing since Title VII's statutory language indicates that Congress *intended* for courts to treat general discrimination differently than retaliatory discrimination. Indeed, the recent Supreme Court case of *Desert Palace* emphasized the importance of statutory construction and the significance of statutory language as the starting point for a court's analysis. 123 S.Ct. at 2153. Moreover, different purposes are involved here and it is logical that the two sections would be treated differently. Section 703(a) of Title VII never expected to shield protected groups from every little slight they encounter; its purpose was to assist in getting discriminated-against plaintiffs into the American workforce and to keep them there. As far as retaliation is concerned, congressional intent was clear: to provide "unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346, 117 S.Ct. 843.

Contrary to the majority's suggestion, the rule on adverse employment actions to which the majority opinion adheres is quite ambiguous. In an attempt to obviate the need for a court's case-by-case determination of what actions by an employer would be "reasonably likely to deter" an employee from engaging in protected activity, the majority points to this Court's case law regarding what constitutes a "material

adverse employment action." The majority relies on *Kocsis v. Multi-Care Management, Inc.*, which requires courts to look to "indices unique to a particular situation," when considering whether or not an employment action is materially adverse. 97 F.3d 876, 886 (6th Cir.1996). This approach ultimately requires a case-by-case review to determine what is "unique" and what is not in each "particular situation." Accordingly, if the goal is to provide guidance while making individual review obsolete, it would be more advantageous to utilize a better defined inquiry than that of *Kocsis* "indices unique to a particular situation." This is particularly so when there is an alternative approach available which would also advance Title VII's goal of equal access to its protections under the law. In the present case, the majority opinion concluded that the forklift transfer constituted an adverse employment action by classifying Burlington Northern's action as an example of "indices unique to a particular situation." While that may satisfactorily dispose of the present case, the majority opinion leaves unclear what other types of adverse actions would fall within the ambit of this category, absent a better delineation of the category. As a result, employers like Burlington Northern could continue to hide behind mere technicalities and claim that other deleterious harms not encompassed in today's ruling, such as employer-sanctioned retaliatory harassment, do not qualify as adverse employment actions when the employee does not experience a demotion or a material change of duties.

The majority suggests that the EEOC's position, in advocating the "reasonably likely to deter" standard, is inconsistent with its concession that legally cognizable adverse action should not encompass trivial slights. Yet no inconsistency is apparent. It is logical that a person pursuing solutions prescribed by EEOC standards would reasonably expect some backlash, in the form of a limited number of negative consequences, some unhappy colleagues and perhaps even some ostracism. The EEOC's recommendation,

however, allows redress only for those plaintiffs who can show that such retaliatory actions would reasonably deter the charging party from engaging in protected activity. EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 (1998). The majority essentially seeks to dismiss the EEOC's approach because it supposedly lacks safeguards against trivial and petty allegations; however, by purporting to exclude trivial and unsubstantiated allegations in order to define the "adverse-employment-action element" narrowly so as not to frustrate the purpose of Title VII, the majority actually impedes Title VII's effectiveness.

Moreover, the majority suggests that the "materially adverse" requirement, "properly interpreted . . . accomplishes [§ 704(a)'s purposes] while appropriately counterbalancing the need to prevent lawsuits based upon trivialities" and that the "indices . . . unique to a particular situation" standard accurately captures all other non-trivial actions taken against the employee. Yet *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999), which utilized the "materially adverse" standard, rejected the employee's argument that her unwarranted negative job evaluation constituted an adverse employment action simply because it was not accompanied by monetary loss or anything else falling into the penumbra of adverse actions listed in *Kocsis*, 97 F.3d at 886. In other words, the "materially adverse" standard was ineffective in *Hollins*, because a negative job evaluation is *not* trivial; it is tangible. It is a black mark on one's record that can have severe future consequences for an employee, inasmuch as an employer can use the unwarranted negative job evaluation to deny the employee future promotions. Similarly, it leaves unaddressed such other deleterious harms such as employer-sanctioned retaliatory harassment. The *Hollins* court made no attempt to utilize the "unique indices" category in order to afford the plaintiff relief. 188 F.3d at 662.

What the majority evidently intends (but fails to state expressly) is that it is unwilling to consider actionable a wide

variety of non-trivial, tangible adverse employment actions in order to limit the number of legitimate, legally cognizable claims that can be filed by aggrieved employees. There is no other apparent reason for its analysis.

Finally, the majority also attempts to rely in part on the Supreme Court decision, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). However, such reliance is also misplaced. In *Burlington*, the Supreme Court, in devising an agency principle to govern employer liability for a supervisor's harassment of an employee, observed that an employer is always liable for a discriminatory "tangible employment action." The Court distinguished tangible employment actions from actions not obviously attributable to the employer, defining tangible employment actions as "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762, 118 S.Ct. 2257. A tangible employment action "requires an official act of the enterprise, a company act," and would include such acts "as discharge, demotion, or undesirable reassignment." *Id.* at 765, 118 S.Ct. 2257. Elsewhere in the opinion the Court observed that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington*, 524 U.S. at 761, 118 S.Ct. 2257. However, *Burlington* addressed Title VII's § 703(a), not § 704(a) and, as discussed earlier, the respective scopes of § 703(a) and 704(a) necessarily differ.[3]

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[3] The Ninth Circuit in *Ray v. Henderson* found defendant's reliance on *Burlington* similarly misplaced when advocating that Title VII qualifies the type of employment actions that would constitute an "adverse" action. 217 F.3d at 1242, n. 5. The Court stated that *Burlington* did not set forth a standard for adverse employment actions in the anti-retaliation context. *Id.*

C. Conclusion

In 1999, a panel of this Court held that an adverse employment action, for purposes of a Title VII retaliation claim, must materially affect the terms and conditions of the plaintiff's employment. *Hollins*, 188 F.3d at 662. Our grant of the petition for rehearing *en banc* provided this Court with an opportunity to reconsider the validity of *Hollins*' unreasoned importation of § 703(a)'s definition of an "adverse employment action" into § 704(a) and to clarify what actions are sufficiently adverse with respect to retaliation claims. A traditional statutory analysis and recognition of Title VII's legislative intent does not dictate the majority's continuing adherence to the "materially adverse" standard, and the rule set forth by the majority fails to provide the clarity desperately needed in this pervasive area of litigation. The lack of clarity in the majority's approach could result in more court decisions against true victims of § 704(a) retaliation because the employer's retaliatory actions conveniently manage to elude the confines of the "materially adverse" definition. Instead of following the majority approach, I would hold that the retaliatory actions Burlington Northern took against White constituted adverse employment actions because such actions are reasonably likely to deter an employee from engaging in protected activity.

SUTTON, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's treatment of "adverse employment actions" under Title VII, and accordingly join Parts I-III of its opinion in full. I respectfully dissent, however, from the majority's resolution of the punitive damages issues, and accordingly write separately to explain my disagreement with Parts IV-V of the Court's opinion.

At the trial in this case, the district court instructed the jury that it may award punitive damages under Title VII only if

the plaintiff proved that she was entitled to them by "clear and convincing" proof. In arguing that the district court erred in this respect and in contending that a punitive damages claim may be proved by a "preponderance" of the evidence under Title VII, the plaintiff relies on two United States Supreme Court decisions and one court of appeals decision. Whether considered together or singly, however, these cases do not support the plaintiff's position.

The first case, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), holds that "circumstantial" evidence, in addition to "direct" evidence, may be used to prove discrimination in a Title VII mixed-motive case. That holding, however, does not answer today's question since circumstantial evidence may be used to prove facts in cases that require a preponderance of the evidence *and* cases that require proof beyond a reasonable doubt, including criminal cases. *See id.* at 2154 ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."). In reaching its circumstantial-evidence conclusion, it is true, *Desert Palace* noted that Congress's "failure" to specify that only "direct" evidence could be used to prove discrimination was "significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42." *Id.* But that mode of analysis bears on our inquiry only if punitive damages represent a form of conventional relief in the same way that circumstantial evidence represents a form of conventional proof. In my view, that is not the case and accordingly *Desert Palace* does not advance the point. If punitive damages are not a conventional remedy, Congress's "failure" to speak to the question would suggest that the burden of proof traditionally applied to unconventional remedies in general or punitive damages in particular should be used.

Two months before the Court decided *Desert Palace*, it made clear that punitive damages are not a conventional remedy. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585 (2003), the Court explained that punitive damages and compensatory damages "serve different purposes," that punitive damages "are aimed at deterrence and retribution" and "serve the same purposes as criminal penalties," and that special constitutional rules of review apply to such awards. If there is a lesson to be drawn from *Desert Palace* and *State Farm*, it would seem to be that a punitive damages claim represents an unconventional form of relief, which deserves a heightened rather than a run-of-the-mill standard of proof.

The two other cases upon which the plaintiff relies are no more helpful in establishing that a preponderance standard applies to punitive damages claims. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion), also concerned an issue of conventional relief (namely, the quantum of proof in Title VII mixed-motive cases), not an issue related to punitive damages. *Id.* at 253, 109 S.Ct. 1775 ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief."). In saying that "[c]onventional rules of civil litigation generally apply in Title VII cases," *id.*, the plurality of course did not establish that these conventional rules apply to requests for unconventional relief, and if anything suggested just the opposite.

Karnes v. SCI Colorado Funeral Services, Inc., 162 F.3d 1077 (10th Cir.1998), is even less helpful. In that case, the defendant argued that the higher burden of proof for punitive damages claims *under Colorado law* should apply to Title VII claims. The court disagreed, concluding that state law does not control the answer to the question, then summarily (and mistakenly) relied on *Price Waterhouse* to say that a preponderance standard applies. *Id.* at 1080-81.

It is one thing, I recognize, to say that the cited cases do not answer the question; it is another to determine the answer. In the plaintiff's defense, the statute does not give us a lot to work with in determining what Congress meant. As an initial matter, the statute itself fails to specify a burden of proof, stating only that a plaintiff may recover punitive damages if she "demonstrates" that the defendant intentionally engaged in discriminatory practices. 42 U.S.C. § 1981a(b)(1). In a later subchapter, Congress defines "demonstrates" unhelpfully to mean "meets the burdens of production and persuasion," *id.* § 2000e(m), a definition that chases the tail of the initial inquiry. Nor does the context in which the relevant words appear or the legislative history to the Civil Rights Act of 1991 offer any other insights into the appropriate burden of proof. Pub.L. No. 102-166, § 102, 105 Stat. 1072.

Under these circumstances, it is appropriate to consider other indicators of statutory meaning, analogous Supreme Court precedents and relevant state laws predating the legislation. *See Steadman v. SEC*, 450 U.S. 91, 95, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981) ("Where Congress has not prescribed the degree of proof which must be adduced ... this Court has felt at liberty to prescribe the standard, for '[i]t is the kind of question which has traditionally been left to the judiciary to resolve.'") (quoting *Woodby v. INS*, 385 U.S. 276, 284, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966)); *see also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them.") (citations and quotations omitted); *Nishikawa v. Dulles*, 356 U.S. 129, 135, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958) (requiring a clear and convincing standard of proof for voluntary expatriation in the absence of congressional guidance and in the light of analogous Supreme Court precedents); *cf.*

Santosky v. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance [in parental-rights termination cases]. We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process."); *Addington v. Texas*, 441 U.S. 418, 431-32, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ("We note that 20 states, most by statute, employ the standard of 'clear and convincing' evidence; 3 states use 'clear, cogent, and convincing' evidence; and 2 states require 'clear, unequivocal and convincing' evidence.") (footnotes and emphasis omitted).

By 1991, when Congress authorized punitive damages in Title VII claims, two Supreme Court cases had intimated that a clear and convincing standard ought to apply to punitive damages claims. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), decided before Congress amended Title VII, the Court noted that "[t]here is much to be said in favor of a State's requiring, as many do, a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt'" for punitive damages. *Id.* at 23 n. 11, 111 S.Ct. 1032 (citations omitted). Two years earlier, Justice Brennan noted that exceptions exist to the preponderance of the evidence standard "when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other *conventional relief*." *Price Waterhouse*, 490 U.S. at 253, 109 S.Ct. 1775 (plurality opinion) (emphasis added).

In analogous settings before 1991, the Supreme Court also had adopted a clear and convincing evidence standard for civil cases involving unconventional relief—in the face of congressional silence about the appropriate burden of proof. In *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), the Supreme Court observed that "Congress ha[d]

not addressed itself [in the Immigration and Nationality Act] to the question of what degree of proof is required in deportation proceedings," then observed that this is "the kind of question which has traditionally been left to the judiciary to resolve." *Id.* at 284, 87 S.Ct. 483. Reasoning that deportation proceedings fall somewhere between ordinary civil litigation and criminal litigation, the Court held that "clear, unequivocal, and convincing evidence" must support a deportation order—the same burden used in analogous cases involving civil fraud, expatriation, adultery, illegitimacy, lost wills and oral contracts. *Id.* at 285 & n. 18, 87 S.Ct. 483. *Compare Nishikawa*, 356 U.S. at 135, 78 S.Ct. 612 (holding that, in the face of congressional silence on the question, proof of an act of expatriation must be by clear and convincing evidence), *with Vance v. Terrazas*, 444 U.S. 252, 265, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980) (upholding a preponderance of the evidence standard specified by Congress after *Nishikawa*).

Supreme Court decisions analogizing punitive damages to criminal penalties also suggest that a higher burden of proof ought to apply here. *See State Farm*, 123 S.Ct. at 1519-20 ("[P]unitive damages . . . are aimed at deterrence and retribution," and "serve the same purposes as criminal penalties."); *id.* at 1521 ("It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor.").

For like reasons, the factual predicate for a punitive damages award—that the defendant acted with "malice" or "reckless indifference," *see* 42 U.S.C. § 1981a(b)(1)—has a

stigmatizing effect that deserves more evidentiary certainty than the preponderance standard provides. *See State Farm*, 123 S.Ct. at 1521 ("[P]unitive damages should only be awarded if the defendant's culpability is [ ] *reprehensible*.") (emphasis added); *Addington*, 441 U.S. at 424, 99 S.Ct. 1804 ("One typical use of the [clear and convincing] standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant ... [to] reduce the risk to the defendant of having his reputation tarnished erroneously."); *see also Haslip*, 499 U.S. at 54, 111 S.Ct. 1032 (O'Connor, J., dissenting) ("[P]unitive damages are quasi-criminal punishment. Unlike compensatory damages . . . punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award.").

By 1991, the supreme courts or legislatures of 29 States had directly addressed the issue whether punitive damage claims required a heightened burden of proof. Of those States, 20 of them chose the clear and convincing standard for all punitive damages claims, one State (Colorado) applied the beyond a reasonable doubt standard to these claims and two States (Florida and Oklahoma) applied the clear and convincing standard when the punitive award was a specific multiple of the actual damages in the case. *See* App. A (identifying the burden of proof in each State with respect to punitive damages in 1991). *See also* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U.L.Rev. 1269, 1278 n. 63 (1993) (identifying States with a clear and convincing standard in 1993).

When Congress addressed this issue in 1991, it also was doing so in the context of a modern trend in favor of the higher standard—a trend that was well underway before the

1991 amendments to Title VII. The American Bar Association recommended the higher standard in 1986. *See* Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination*, 1986 A.B.A. Sec. Litig. 33 ("Because one of the purposes of punitive damages is punishment . . . [t]he committee concludes [ ] that the 'clear and convincing' burden of proof is appropriate for an award of punitive damages. This is the standard often used in fraud cases, to which there is some analogy."). The American Law Institute did the same in 1991. *See* 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 264 (1991) ("An enterprise should be liable for punitive damages only when there is clear and convincing evidence of reckless disregard for the safety of others in the decisions made by management officials or other senior personnel."). As of today, the supreme courts or legislatures from 34 States have addressed the burden of proof issue, with 31 now requiring a heightened burden of proof. *See* App. B (identifying the burden of proof for punitive damages in each State as of 2004).

The States within the Sixth Circuit, moreover, are nearly uniform in applying a clear and convincing standard. By 1991, Ohio and Kentucky had established the standard by statute, and Tennessee did so by court decision in 1992. *See* App. A. Although the Michigan courts have not directly addressed the issue, at least one state appeals court has approved, without discussion, a jury instruction requiring proof by a preponderance of the evidence for an award of exemplary damages. *Green v. Evans*, 156 Mich.App. 145, 401 N.W.2d 250, 252 (1985). *But see Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50, 55 (1980) (noting that exemplary damages serve only to compensate plaintiffs for "humiliation, sense of outrage, and indignity"—and may not serve as punishment to the defendant).

While there may not be a Rosetta Stone to guide us here, Supreme Court precedents concerning punitive damages and comparable forms of relief, as well as relevant state-law practices, suggest that a clear and convincing standard of proof ought to govern these claims. A claim for punitive damages, in a nutshell, is more akin to claims concerning fraud, deportation and expatriation, oral contracts and illegitimacy than it is to more conventional civil claims. Accordingly, the heightened burden of proof associated with these claims and traditionally associated with punitive damages claims in general ought to apply.

The additional citations identified by the majority in support of the plaintiff's position do not alter this analysis. *Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983), deals with whether actual malice is required to obtain punitive damages under § 1983, not with the preponderance/clear and convincing debate raised here. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.1990), involved a products liability claim under New York law, in which the defendant argued that the Due Process Clause of the United States Constitution *requires* a clear and convincing standard. In rejecting that argument, the court "acknowledg[ed] the force of the argument that since punitive damages are awarded primarily to punish a defendant for past conduct and to deter it and others from similar conduct in the future, a standard of proof appropriate for 'quasi-criminal wrongdoing' should be required." *Id.* at 282.

In re Exxon Valdez, 270 F.3d 1215 (9th Cir.2001), is an admiralty-law decision in which the Ninth Circuit concluded that the district court did not "abuse its discretion" in applying a preponderance standard to a punitive damages claim. *Id.* at 1232-33. Again, the primary debate in the case was whether the Due Process Clause required a higher standard. Moreover, if like the Ninth Circuit we applied an abuse of discretion to this issue (which we do not), it no

doubt would be a very different question whether the district court in this case abused its discretion in imposing the higher standard of proof. The Fourth Circuit's decision in *Notter v. North Hand Protection*, 89 F.3d 829, 1996 WL 342008 (4th Cir. June 21, 1996), besides being unpublished, rejects only one argument by the employer in that case—that the higher burden of proof for punitive damages claims *under state law* should control the Title VII inquiry. *Id.* at *10. And the Harvard Law Review piece supports the employer's position in this case. In addition to approving "measures that guide and direct juries toward appropriate [ ] determinations," it notes that "the widespread acceptance of the clear and convincing evidence standard demonstrates [the] states' acknowledgment of the retributive function of punitive damages." *Jury Determination of Punitive Damages*, 110 Harv. L.Rev. 1513, 1532-33, 1536 (1997).

Nor does the cap on punitive damages claims under Title VII advance plaintiff's argument. While a cap on punitive damages addresses one issue in this area (the outer limits of awards), it does not account for the other issues in this area—the appropriate quantum of proof required (1) before a jury may attach a "reprehensibility" label to another's conduct, *State Farm*, 123 S.Ct. at 1521, or (2) before a jury may award punitive damages that have a significant ratio to the underlying compensatory award. In ascertaining the constitutional limits of punitive damages, it is the ratio of the two awards, not the size of the punitive damages award, that the Supreme Court considers in measuring the award's compliance with Due Process—which is why awards under $300,000 may still violate the Constitution and why they still deserve the prevailing burden of proof for punitive damages claims in this country, namely clear and convincing evidence. *See id.* at 1524 (ratios involving "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1")

(citation omitted); *see also Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (8th Cir.2002) (reducing punitive damages award from $120,000 to $60,000 to correct constitutional deficiency); *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804, 810 (Ala.2000) ("In this case, the punitive-damages award of $75,000 is 30 times the compensatory-damages award of $2,500. Considering the facts before us, we find the ratio of 30:1 to be unreasonable."); *Employees' Benefit Ass'n v. Grissett*, 732 So.2d 968, 979 (Ala.1998) ("The punitive award of $150,000 is 170 times the compensatory award of $880. That 170:1 ratio is unacceptable.").

But that is not the most significant problem with invoking the damages cap in this instance. All agree that Congress did not give the courts particularly helpful guidance here, requiring us to answer what the burden of proof for a federal punitive damages claim should be in the face of congressional silence. An answer that says punitive damages claims receive a preponderance standard when the award is under $300,000 but receive a clear and convincing standard when the award is some higher amount to be named later does not seem very helpful. Neither do I understand how the damages cap could make a difference in the outcome of this case. If, in this instance, the Court had concluded that a clear and convincing standard generally applies to punitive damages claims in the face of congressional silence, the existence of a cap of this sort by itself could not alter the presumption. If instead the Court had concluded that a preponderance standard generally applies in this setting, the existence of a damages cap would make no difference at all. Either way, in other words, the outcome would be unaffected by the existence of the cap.

I have one other qualm with the majority's decision on this point—which is reaching the burden of proof issue at all. I do not understand how White could prevail on remand in a punitive-damages-only trial, no matter what the burden of persuasion is. Because we required an en banc hearing to

decide whether White suffered an adverse employment action and, notably, to determine whether this Circuit embraced the ultimate-employment-decision test, it would not seem possible for a jury to conclude that Burlington Northern acted with reckless disregard for White's federally-protected rights in imposing the *suspension*. *See* 42 U.S.C. § 1981a(b)(1) (requiring proof that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual"); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) ("The terms 'malice' or 'reckless indifference' pertain to the employer's *knowledge* that it may be acting in *violation of federal law*, not its awareness that it is engaging in discrimination.") (emphasis added); *id.* at 537, 119 S.Ct. 2118 (recognizing that imposing punitive damages would be inappropriate when "[t]he underlying theory of discrimination [is] novel or otherwise poorly recognized").

A punitive damages claim with respect to the *transfer* count is even harder to imagine. Until now, no Sixth Circuit case (to my knowledge) has found a cognizable Title VII claim arising from a lateral transfer, let alone a transfer *within* an employee classification and without a loss in pay. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir.1996) ("[R]eassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims.") (citing *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.1987)). While the opinion concludes that this transfer count is cognizable under Title VII, its reasons for doing so could not support a finding that Burlington Northern acted with "malice" or "reckless indifference" to White's rights.

For these reasons, I respectfully dissent from Parts IV and V of the Court's opinion.

APPENDIX A

State Burdens of Proof for Punitive Damages in 1991

By 1991, the supreme courts or legislatures of the following States had adopted a higher burden of proof for awarding punitive damages:

Alabama	Ala. Code § 6-11-20(a) (1991) (clear and convincing evidence).
Alaska	Alaska Stat. § 09.17.020 (1991) (clear and convincing evidence).
Arizona	*Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 680-81 (Ariz. 1986) ("[W]hile a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind.").
California	Cal. Civ. Code § 3294(a) (1991) (clear and convincing evidence).
Colorado	Colo. Rev. Stat. § 13-25-127(2) (1991) (beyond a reasonable doubt).
Florida	Fla. Stat Ann. § 768.73(1)(b) (1991) (punitive damages exceeding three times actual damages must be proved by clear and convincing evidence).
Georgia	Ga. Code Ann. § 51-12-5.1(b) (1991) (clear and convincing evidence).
Hawaii	*Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989) ("[F]or all punitive damage claims we adopt the clear and convincing standard of proof.").

Indiana	Ind. Code § 34-4-34-2 (1991) (clear and convincing evidence).
Iowa	Iowa Code § 668A.l(1)(a) (1991) (clear and convincing evidence).
Kansas	Kan. Stat. Ann. § 60-3702(c) (1991) (clear and convincing evidence).
Kentucky	Ky. Rev. Stat. Ann. § 411.184(2) (1991) (clear and convincing evidence).
Maine	*Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) ("[W]e hold that a plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.").
Minnesota	Minn. Stat. § 549.20(1)(a) (1991) (clear and convincing evidence).
Montana	Mont. Code Ann. § 27-1-221(5) (1991) (clear and convincing evidence).
Nevada	Nev. Rev. Stat. 42.005(1) (1991) (clear and convincing evidence).
North Dakota	N.D. Cent. Code § 32-03.2-11 (1991) (clear and convincing evidence).
Ohio	Ohio Rev. Code Ann. § 2315.21(C)(3) (1991) (clear and convincing evidence).
Oklahoma	Okla. Stat. tit. 23 § 9.1.A (1991) (punitive damages exceeding the amount of actual damages must be proved by clear and convincing evidence).
Oregon	Or. Rev. Stat. § 41.315(1) (1991) (clear and convincing evidence).

South Carolina	S.C. Code Ann. § 15-33-135 (1991) (clear and convincing evidence).
Utah	Utah Code Ann. § 78-18-1(1)(a) (1991) (clear and convincing evidence).
Wisconsin	*Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980) ("We hold that the [clear, satisfactory and convincing evidence] burden of proof shall apply to punitive damages claims hereafter.").

By 1991, the supreme courts or legislatures of the following States had rejected a higher burden of proof for awarding punitive damages:

Connecticut	*Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370, 375 (Conn. 1992) ("We disagree . . . with the . . . conclusion . . . that clear and convincing proof is an appropriate standard of proof whenever claims of tortious conduct [such as those involving punitive damages] have serious consequences or harsh or far-reaching effects on individuals or require the proof of willful, wrongful and unlawful acts.").
Idaho	Idaho Code § 6-1604(1) (1991) (preponderance of the evidence).
Mississippi	*Gaylord's of Meridian, Inc. v. Sicard*, 384 So. 2d 1042, 1045 (Miss. 1980) ("Although the damages are by way of penalizing the defendant against whom they are sought, the proof is by a preponderance of the evidence rather than beyond a reasonable doubt.") *overruled on other grounds by C & C Trucking Co. v. Smith*, 612 So. 2d 1092, 1105-06 (Miss. 1992); *Andrew Jackson Life*

Ins. Co. v. Williams, 566 So. 2d 1172, 1188 (Miss. 1990) ("[T]he law requires a finding of 'bad faith-*plus*'—based upon a preponderance of the evidence—before punitive damages may be awarded.").

Missouri — *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. 1990) ("The defendant argues that punitive damage submissions should require 'clear and convincing' evidence. This requirement is contrary to our normal requirements in the submission of civil cases. We are not disposed so to hold, or to follow cases from other jurisdictions so holding.").

New Mexico — *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 709 P.2d 649, 654 (N.M. 1985) ("It is the general rule . . . that issues of fact in civil cases are to be determined according to the preponderance of the evidence . . . . We are not convinced that the degree of proof should be changed [to require clear and convincing evidence] in punitive damage areas.").

South Dakota — *Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991) ("[S.D. Codified Laws § 21-1-4.1] does *not* establish a clear and convincing evidence standard but merely requires clear and convincing evidence to show a *reasonable* basis [to believe the defendants committed acts warranting punitive damages]. The clear and convincing language merely modifies the 'reasonable basis' language to make a prima facie showing that punitive damages *may* be in order.").

By 1991, the supreme courts and legislatures of the following States had yet to address the question whether claims for punitive damages require a heightened burden of proof, though (as noted below) some lower courts had addressed the issue and some supreme courts had mentioned, without discussing, jury instructions requiring a preponderance of the evidence:

Arkansas	*Nat'l Bank of Commerce v. McNeill Trucking Co., Inc.*, 828 S.W.2d 584, 591 (Ark. 1992) (Dudley, J., concurring) ("I would hope that the possible changes discussed in this opinion [*i.e.* the adoption of a clear and convincing standard for punitive damages] might be brought before this court in an adversarial manner . . . . It is a matter which we have never addressed.").
Delaware	*Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891-92 (Del. 1983) ("We now turn to Cloroben's contention that the jury improperly awarded punitive damages in that they were not supported by a preponderance of the evidence . . . . Our review of the record indicates that there is sufficient evidence to support a finding . . . [and] we must reject the argument that there was insufficient evidence to support an award of punitive damages."); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 715 (Del. Super. Ct. 1967) (instructing the jury that "[p]unitive damages may be awarded only if the jury finds by a preponderance of the evidence that the defendants' actions were motivated by some form of malice.").

Illinois	*Illinois Terminal R.R. Co. v. Thompson*, 71 N.E. 328, 333 (Ill. 1904) (approving a jury instruction that "left it to the discretion of the jury to impose whatever damages they might choose, even to the extent of allowing punitive damages" by a preponderance of the evidence).
Louisiana	*Galjour v. Gen. Am. Tank Car Corp.*, 764 F. Supp. 1093, 1100-01 (E.D. La. 1991) ("In fact, there are no Louisiana cases which specifically discuss the appropriate burden of proof for exemplary damages . . . . The defendants' argument that a heightened burden of proof should apply to exemplary damages is not without merit, as shown by recent legislative enactments in other jurisdictions, but it is not the law in Louisiana. Until the Louisiana legislature takes action to raise the burden, the law is that the burden of proof for exemplary damages is by a preponderance of the evidence.") (footnote omitted); *see also Int'l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988) ("Under Louisiana law, punitive or other 'penalty' damages are not allowable unless expressly authorized by statute.").
Maryland	*Gorman v. Sabo*, 122 A.2d 475, 479 (Md. 1956) ("There is no doubt that punitive damages may be recovered in [this] case. . . . The applicable law was correctly put to the jury by the trial court in his charge. He told them the Sabos must prove their case 'by a fair preponderance of the evidence.'") (citation omitted); *Thorne v.*

Contee, 565 A.2d 102, 108 (Md. Ct. Spec. App. 1989) ("In order for the issue of punitive damages to go to the jury, Thorne must have produced sufficient evidence of Contee's wanton or reckless conduct to meet the preponderance of the evidence test"), *cert. denied*, 569 A.2d 643 (Md. 1990); 569 A.2d 1242 (Md. 1990).

Massachusetts *Santos v. Chrysler Corp.*, No. 921039, 1996 WL 1186818, at *3 (Mass. Super. Ct. Sept. 18, 1996) ("Chrysler contends that the court erred because it failed to instruct the jury that they must find by clear and convincing evidence that Chrysler was grossly negligent before they could award punitive damages. The contention is meritless. Under Massachusetts law the burden of proof in civil proceedings of this kind is satisfied 'by a fair preponderance of the evidence.'") (citation omitted), *aff'd in part and remanded on other grounds*, 715 N.E.2d 47 (Mass. 1999).

Michigan *Green v. Evans*, 401 N.W.2d 250, 252 (Mich. Ct. App. 1985) (approving, without discussing the burden of proof, a jury instruction stating: "Such exemplary damages only are recoverable if the Plaintiff has proven by a preponderance of the evidence, malice, willful and wanton misconduct or negligence so great as to indicate reckless disregard of the rights of another."). *But see Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (noting that exemplary damages only serve to compensate plaintiffs for "humiliation, sense of out-

	rage, and indignity"—exemplary damages may not serve as punishment to the defendant).
Nebraska	*Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) ("[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction.").
New Hampshire	New Hampshire has not addressed the burden of proof for punitive damages. *See* N.H. Rev. Stat. Ann. § 507:16 (2004) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute.").
New Jersey	*Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 482 (N.J. 1986) (refusing to address the burden of proof in punitive damages cases because "the parties have not briefed or argued the issue, nor have the courts below addressed it"); *see also Jackson v. Consol. Rail Corp.*, 538 A.2d 1310, 1321 n.5 (N.J. Super. Ct. App. Div. 1988) ("Defendant also attacks the punitive damage verdict because the court in its charge did not place the burden on plaintiff to prove same by 'clear and convincing' evidence. However, that is not the present standard applicable in New Jersey.").
New York	*Greenbaum v. Handelsbanken*, 979 F.Supp. 973, 982 (S.D.N.Y. 1997) ("[T]he Court determines that until . . . higher authorities elect[] to address the question, the preponderance of the evidence standard should apply to punitive damages deliberations.").

North Carolina	*Caudle v. Benbow*, 45 S.E.2d 361, 362 (N.C. 1947) (approving, without discussing, a jury instruction requiring the jury to "first find by the preponderance of the evidence the presence of actual malice").
Pennsylvania	*Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 n.14 (Pa. 1985) (Hutchinson, J., delivering the judgment of the court and an opinion joined by only one of the five remaining justices) (recognizing that many jurisdictions have adopted a clear and convincing standard and concluding: "We believe the goal of limiting punitive damage awards in the context of products liability litigation is best served by focusing on the nature of the defendant's conduct instead of increasing the plaintiff burden of persuasion."); *Rizzo v. Michener*, 584 A.2d 973, 979 (Pa. Super. Ct. 1990) ("The trial judge must determine in the first instance whether the plaintiff has presented sufficient evidence to support a punitive damage claim, which requires evidence on which the jury might reasonably conclude that outrageous conduct has been established by a preponderance of the evidence."), *appeal denied*, 596 A.2d 159 (Pa. 1991).
Rhode Island	Rhode Island has not addressed the burden of proof for recovering punitive damages.
Tennessee	Tennessee first addressed the burden of proof for punitive damages in 1992 in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900-01 (Tenn. 1992), and held that the clear and convincing standard applies to all claims for punitive damages.

Texas	*Lawson-Avila Const., Inc. v. Stoutamire*, 791 S.W.2d 584, 594 (Tex. Ct. App. 1990) ("We . . . continue to follow the Texas precedent established by the Courts of this State and hold that the burden of proof in cases involving . . . exemplary damages is by a preponderance of the evidence [and not clear and convincing evidence]."") (internal quotations omitted), *writ of error denied* (Dec. 12, 1990).
Vermont	Vermont has not addressed the burden of proof for recovering punitive damages.
Virginia	*Peacock Buick, Inc. v. Durkin*, 277 S.E.2d 225, 227 n.3 (Va. 1981) (approving, without discussing the burden of proof, a jury instruction stating: "[I]f you believe from a preponderance of the evidence that the defendant acted wantonly, oppressively, or with such recklessness as evinced a conscious disregard of the rights of others, or with such malice as implied a spirit of mischief, or criminal indifference to civil obligations, you may award the plaintiff such additional sum as punitive damages.").
Washington	*Sintra, Inc. v. City of Seattle*, 935 P.2d 555, 566 (Wash. 1997) (holding, without addressing the burden of proof, that the trial court properly instructed the jury that it could award punitive damages on the 42 U.S.C. § 1983 claim 'only if you find [by a preponderance of the evidence] that the conduct of an individual defendant was malicious or taken in reckless disregard of plaintiffs' rights'") (alteration in original). *But see Dailey v. North Coast Life Ins. Co.*,

919 P.2d 589, 590 (Wash. 1996) ("Since its earliest decisions, this court has consistently disapproved of punitive damages as contrary to public policy.").

West Virginia *Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W. Va. 1991) (reinstating an award of punitive damages, without discussing the burden of proof, based on the following jury instruction: "[I]f you find from a preponderance of all the evidence in this case, that the actions of the Defendants in evicting the Plaintiff were in total disregard of the Plaintiff's rights as a lessee in the leased premises and that such actions were willful and wanton then you may award the Plaintiff punitive damages.").

Wyoming *Campen v. Stone*, 635 P.2d 1121, 1127 (Wyo. 1981) (approving, without discussing the burden of proof, a jury instruction stating: "Punitive damages can properly be awarded . . . only if, one of the following [acts] has been proven by a preponderance of the evidence.") (internal quotations omitted).

APPENDIX B

State Burdens of Proof for Punitive Damages in 2004

As of today, the supreme courts or legislatures from the following States have adopted the higher burden of proof for awarding punitive damages:

Alabama	Ala. Code § 6-11-20(a) (2004) (clear and convincing evidence).
Alaska	Alaska Stat. § 09.17.020(b) (2004) (clear and convincing evidence).
Arizona	*Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 680-82 (Ariz. 1986) ("[W]hile a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind."); *Saucedo ex rel. Sinaloa v. Salvation Army*, 24 P.3d 1274, 1277 (Ariz. Ct. App. 2001) ("In Arizona, to recover punitive damages, a plaintiff must prove by clear and convincing evidence that a 'defendant's wrongful conduct was guided by evil motives or wilful or wanton disregard of the interests of others.'") (citation omitted), *review denied* (Oct. 3, 2001).
California	Cal. Civ. Code § 3294(a) (2004) (clear and convincing evidence).
Colorado	Colo. Rev. Stat. § 13-25-127(2) (2004) (beyond a reasonable doubt).
Florida	Fla. Stat. Ann. § 768.725 (2004) (clear and convincing evidence).

Georgia	Ga. Code Ann. § 51-12-5.1(b) (2004) (clear and convincing evidence).
Hawaii	*Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 71 (Haw. 2001) ("Clear and convincing evidence of 'some wilful misconduct or . . . entire want of care which would raise presumption of a conscious indifference to consequences' supports an award of punitive damages.") (internal quotations omitted).
Idaho	Idaho Code § 6-1604(1) (2004) (clear and convincing evidence).
Indiana	Ind. Code § 34-51-3-2 (2004) (clear and convincing evidence).
Iowa	Iowa Code § 668A.1(1)-(2) (2004) (clear and convincing evidence).
Kansas	Kan. Stat. Ann. § 60-3702(c) (2004) (clear and convincing evidence).
Kentucky	Ky. Rev. Stat. Ann. § 411.184(2) (2004) (clear and convincing evidence).
Maine	*St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995, 1001 (Me. 2002) ("'[I]n order to recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice.'") (quoting *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985)).
Maryland	*Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992) ("[I]n *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages."); *Carter v. Aramark Sports and Entm't Servs., Inc.*, 835 A.2d

	262, 287 (Md. Ct. Spec. App. 2003) ("The 'clear and convincing' standard of proof applies to make out a claim for punitive damages.").
Minnesota	Minn. Stat. § 549.20(1)(a) (2004) (clear and convincing evidence).
Mississippi	Miss. Code Ann. § 11-1-65(1)(a) (2004) (clear and convincing evidence).
Missouri	*Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996) ("For common law punitive damage claims, the evidence must meet the clear and convincing standard of proof."); *Hoskins v. Bus. Men's Assurance*, 116 S.W.3d 557, 564 (Mo. Ct. App. 2003) ("Punitive damages are properly submitted in a negligence [or strict liability] case only if there is clear and convincing evidence that 'at the time of the negligent act, the defendant[s] knew or had reason to know that there was a high degree of probability that the action would result in injury.'") (citation omitted).
Montana	Mont. Code Ann. § 27-1-221(5) (2004) (clear and convincing evidence).
Nevada	Nev. Rev. Stat. 42.005(1) (2004) (clear and convincing evidence).
New Jersey	N.J. Stat. Ann. § 2A:15-5.12(a) (2004) (clear and convincing evidence).
North Carolina	N.C. Gen. Stat. § 1D-15(b) (2004) (clear and convincing evidence).
North Dakota	N.D. Cent. Code § 32-03.2-11(1) (2004) (clear and convincing evidence).

Ohio	Ohio Rev. Code Ann. § 2315.21(C)(2) (2004) (clear and convincing evidence).
Oklahoma	Okla. Stat. tit. 23, § 9.1.B-.D (2004) (clear and convincing evidence).
Oregon	Or. Rev. Stat. § 18.537(1) (2004) (clear and convincing evidence).
South Carolina	S.C. Code Ann. § 15-33-135 (2004) (clear and convincing evidence).
Tennessee	*Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) ("[A] plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence."); *Barnett v. Lane*, 44 S.W.3d 924, 928 (Tenn. Ct. App. 2000) ("[A]n award [of punitive damages] is only appropriate when the necessary conduct has been shown 'by clear and convincing evidence.'").
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 41.003(b) (2004) (clear and convincing evidence).
Utah	Utah Code Ann. § 78-18-1(1)(a) (2004) (clear and convincing evidence).
Wisconsin	*Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980) ("We hold that the [clear, satisfactory and convincing evidence] burden of proof shall apply to punitive damages claims hereafter."); *City of West Allis v. Wis. Elec. Power Co.*, 635 N.W.2d 873, 881 (Wis. Ct. App. 2001) ("The evidence [supporting a punitive damages award] must also be 'clear and convincing.'"), *pet. for review denied*, 643 N.W.2d 93 (Wis. 2002).

As of today, the supreme courts or legislatures from the following States have rejected a higher burden of proof for awarding punitive damages:

Connecticut	*Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370, 375 (Conn. 1992) ("We disagree . . . with the . . . conclusion . . . that clear and convincing proof is an appropriate standard of proof whenever claims of tortious conduct [such as those involving punitive damages] have serious consequences or harsh or far-reaching effects on individuals or require the proof of willful, wrongful and unlawful acts.").
New Mexico	*United Nuclear Corp. v. Allendale Mut. Ins.*, 709 P.2d 649, 654 (N.M. 1985) ("It is the general rule . . . that issues of fact in civil cases are to be determined according to the preponderance of the evidence . . . . We are not convinced that the degree of proof should be changed [to require clear and convincing evidence] in punitive damages areas.").
South Dakota	*Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991) ("[S.D. Codified Laws § 21-1-4.1] does *not* establish a clear and convincing evidence standard but merely requires clear and convincing evidence to show a *reasonable* basis [to believe the defendants committed acts warranting punitive damages]. The clear and convincing language merely modifies the 'reasonable basis' language to make a prima facie showing that punitive damages *may* be in order.").

As of today, the supreme courts and legislatures from the following States have yet to address the question whether claims for punitive damages require a heightened burden of proof, though (as noted below) some lower courts have addressed the issue and some supreme courts had mentioned, without discussing, jury instructions requiring a preponderance of the evidence:

Arkansas	*Nat'l Bank of Commerce v. McNeill Trucking Co., Inc.*, 828 S.W.2d 584, 590 (Ark. 1992) (Dudley, J., concurring) ("I would hope that the possible changes discussed in this opinion [*i.e.* the adoption of a clear and convincing standard for punitive damages] might be brought before this court in an adversarial manner . . . . It is a matter which we have never addressed.").
Delaware	*Cloroben Chem. Corp . v. Comegys*, 464 A.2d 887, 891-92 (Del. 1983) ("We now turn to Cloroben's contention that the jury improperly awarded punitive damages in that they were not supported by a preponderance of the evidence . . . . Our review of the record indicates that there is sufficient evidence to support a finding . . . [and] we must reject the argument that there was insufficient evidence to support an award of punitive damages."); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 715 (Del. Super. Ct. 1967) (instructing the jury that "[p]unitive damages may be awarded only if the jury finds by a preponderance of the evidence that the defendants' actions were motivated by some form of malice.").

Illinois	*Illinois Terminal R.R. Co. v. Thompson*, 71 N.E. 328, 333 (Ill. 1904) (approving a jury instruction that "left it to the discretion of the jury to impose whatever damages they might choose, even to the extent of allowing punitive damages" by a preponderance of the evidence).
Louisiana	*Hill v. Sampson*, 628 So. 2d 81, 84 (La. Ct. App. 1993) ("While this argument has theoretical appeal, we are not inclined by these judicial means to establish 'clear and convincing evidence' as the standard of proof for exemplary damages under [Louisiana's DUI law]. In our view, had the legislature intended a higher standard of proof than that of a preponderance of the evidence, it would have clearly so indicated."); *Rivera v. United Gas Pipeline Co.*, 697 So. 2d 327, 335 (La. Ct. App. 1997) (holding that earlier interpretation of Louisiana's hazardous substance handling statute "says nothing of creating a 'clear and convincing' burden of proof, and this Court is not prepared to create one . . . . Ergo, until the Louisiana legislature takes direct action, the burden of proof for exemplary damages is by a preponderance of the evidence."), *cert. denied*, 704 So. 2d 1196, 1197 (La. 1997).
Massachusetts	*Santos v. Chrysler Corp.*, No. 921039, 1996 WL 1186818, at *3 (Mass. Super. Ct. Sept. 18, 1996) ("Chrysler contends that the court erred because it failed to instruct the jury that they must find by clear and convincing evidence that Chrysler was grossly negli-

	gent before they could award punitive damages. The contention is meritless. Under Massachusetts law the burden of proof in civil proceedings of this kind is satisfied 'by a fair preponderance of the evidence.'"), *affirmed in part and remanded on other grounds*, 715 N.E.2d 47 (Mass. 1999).
Michigan	*Green v. Evans*, 401 N.W.2d 250, 252 (Mich. Ct. App. 1985) (approving, without discussing the burden of proof, a jury instruction stating: "Such exemplary damages only are recoverable if the Plaintiff has proven by a preponderance of the evidence, malice, willful and wanton misconduct or negligence so great as to indicate reckless disregard of the rights of another"). *But see Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (noting that exemplary damages only serve to compensate plaintiffs for "humiliation, sense of outrage, and indignity"—exemplary damages may not serve as punishment to the defendant).
Nebraska	*Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) ("[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction.").
New Hampshire	New Hampshire has not addressed the burden of proof for punitive damages. *See* N.H. Rev. Stat. Ann. § 507:16 (2004) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute.").

New York — *Greenbaum v. Svenska Handelsbanken*, 979 F. Supp. 973, 978-82 (S.D.N.Y. 1997) ("[T]he Court determines that until . . . higher authorities elect[] to address the question, the preponderance of the evidence standard should apply to punitive damages deliberations."). *Compare Munoz v. Puretz*, 753 N.Y.S.2d 463, 466 (N.Y. App. Div. 2003) ("In order to recover punitive damages, a plaintiff must show [certain conduct] by 'clear, unequivocal and convincing evidence.'") (citation omitted), *with In re Seventh Judicial Dist. Asbestos Litig.*, 593 N.Y.S.2d 685, 686-87 (N.Y. App. Div. 1993) ("The trial court properly instructed the jury that the evidentiary standard for proving entitlement to punitive damages is preponderance of the evidence, not clear and convincing evidence.").

Pennsylvania — *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 n.14 (Pa. 1985) (Hutchinson, J. delivering the judgment of the court and an opinion joined by only one of the five remaining justices) (recognizing that many jurisdictions have adopted a clear and convincing standard and concluding: "We believe the goal of limiting punitive damage awards in the context of products liability litigation is best served by focusing on the nature of the defendant's conduct instead of increasing the plaintiff's burden of persuasion."); *Rizzo v. Michener*, 584 A.2d 973, 979 (Pa. Super. Ct. 1990) ("The trial judge must determine in the first instance whether the plaintiff has presented sufficient evidence to support a punitive damage claim,

	which requires evidence on which the jury might reasonably conclude that outrageous conduct has been established by a preponderance of the evidence."), *appeal denied*, 596 A.2d 159 (Pa. 1991).
Rhode Island	Rhode Island has not addressed the burden of proof for recovering punitive damages.
Vermont	Vermont has not addressed the burden of proof for recovering punitive damages.
Virginia	*Peacock Buick, Inc. v. Durkin*, 277 S.E.2d 225, 227 n.3 (Va. 1981) (approving, without discussing the burden of proof, a jury instruction stating: "[I]f you believe from a preponderance of the evidence that the defendant acted wantonly, oppressively, or with such recklessness as evinced a conscious disregard of the rights of others, or with such malice as implied a spirit of mischief, or criminal indifference to civil obligations, you may award the plaintiff such additional sum as punitive damages."); *RF & P Corp. v. Little*, 40 S.E.2d 908, 914 (Va.1994) (holding that a preponderance of the evidence standard applies to a knowing and willful violation of a statute resulting in a civil fine, and the clear and convincing evidence standard applies only "to certain cases that are equitable in nature, such as suits involving fraud and misrepresentation, undue influence, [or] estoppel.").
Washington	*Sintra, Inc. v. City of Seattle*, 935 P.2d 555, 566 (Wash. 1997) (stating, without addressing the burden of proof, that the trial court properly instructed the jury that it could

	award punitive damages on a 42 U.S.C. § 1983 claim "only if you find [by a preponderance of the evidence] that the conduct of an individual defendant was malicious or taken in reckless disregard of plaintiffs' rights.") (quotation omitted and alteration in original). *But see Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) ("Since its earliest decisions, this court has consistently disapproved of punitive damages as contrary to public policy.").
West Virginia	*Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W. Va. 1991) (finding sufficient evidence to support an award of punitive damages, without discussing the burden of proof, based on the following jury instruction: "[I]f you find from a preponderance of all the evidence in this case, that the actions of the Defendants in evicting the Plaintiff were in total disregard of the Plaintiff's rights as a lessee in the leased premises and that such actions were willful and wanton.").
Wyoming	*Campen v. Stone*, 635 P.2d 1121, 1127 (Wyo. 1981) (approving, without discussing the burden of proof, a proposed jury instruction stating: "Punitive damages can properly be awarded . . . only if, one of the following [acts] has been proven by a preponderance of the evidence.").

APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 00-6780, 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY,
Defendant-Appellant/Cross-Appellee.

Argued: Sept. 11, 2002.
Decided and Filed: Nov. 13, 2002.

Before: KRUPANSKY and CLAY, *Circuit Judges*; GWIN, *District Judge.*[*]

GWIN, D.J., delivered the opinion of the court, in which KRUPANSKY, J., joined. CLAY, J. (pp. 455-461), delivered a separate dissenting opinion.

OPINION

GWIN, *District Judge.*

With this appeal, we examine whether actions taken by the Appellant Burlington Northern & Santa Fe Railway Co. ("Burlington Northern" or "railroad") were sufficiently adverse employment actions to sustain a cause of action

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[*] The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a). We also review whether the district court erred when it denied the Burlington Northern's motion for judgment as a matter of a law. In making that motion, Appellant Burlington Northern argued that the evidence was insufficient to support the jury's verdict in favor of the plaintiff on the retaliation claim. Finally, we decide if the district court abused its discretion when awarding attorney's fees[1] to the plaintiff.

With the plaintiff's cross-appeal, we examine whether the district court erred when it instructed the jury that the plaintiff had to prove malice or reckless disregard by clear and convincing evidence to recover punitive damages under 42 U.S.C. § 1981(a).

We find that Appellee Sheila White failed to establish a retaliation claim under Title VII. Burlington Northern's transfer of White to a different duty within the same job classification and with the same salary, title and seniority was not an adverse employment action sufficient to sustain a Title VII retaliation claim. Similarly, we find that Burlington Northern's temporary suspension of White was not sufficiently adverse to support a Title VII claim. Since the appellant's actions did not result in a cognizable employment action, we reverse the district court and set aside the jury's verdict. Because we set aside the jury's verdict, the issues concerning the jury instructions and attorney's fees are moot.

I. Procedural Background

Plaintiff White brought this action and claimed unlawful discrimination based on sex, 42 U.S.C. § 2000e-2(a)(1), and

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[1] As a matter of style, we use the phrase "attorney's fees" because that usage appears in 17 U.S.C. § 505 and is preferred by the Supreme Court. *See, e.g., Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 253 n. 1 (6th Cir.1997).

for unlawful retaliation, 42 U.S.C. § 2000e-3. After a jury trial, the jury found in White's favor on her retaliation claim and against her on her sexual harassment and punitive damages claims. The jury awarded White $43,500.00 in damages on the retaliation claim.

On September 18, 2000, Appellant Burlington Northern filed a motion for judgment as a matter of law or, in the alternative, for a new trial. Burlington Northern argued that Plaintiff White failed to establish retaliation because her changed job duties and temporary suspension were not adverse employment actions within the meaning of Title VII. Burlington Northern also argued that Plaintiff White failed to show that the railroad's asserted legitimate, non-discriminatory reason for transferring her was pretextual. Finally, the railroad claimed that the temporal proximity of White's EEOC charge and her suspension did not support an inference of retaliation.

On November 16, 2000, the district court denied Burlington Northern's motion for judgment or, in the alternative, for new trial. The district court found that White presented sufficient evidence that her transfer from forklift operator to working on the track was an adverse employment action. In regards to this finding, it relied upon the "indices that might be unique to a particular situation" language of *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999).

The district court also held that White's temporary suspension was an adverse employment action. It found the temporary suspension was an adverse employment action although Burlington Northern had reversed the decision and made White whole within a month. In making this decision, the district court discounted Burlington Northern's reliance on *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir.1999). The district court distinguished *Dobbs-Weinstein* because the faculty member there did not suffer

immediate suspension, continued working during the appeals process, and the case dealt with the unique situation of tenure in an academic setting.

With respect to Burlington Northern's claim that White had not proven its legitimate, non-retaliatory reason was pretextual, the district court held that the jurors received conflicting evidence that the jury could properly resolve in White's favor. Similarly, the district court held that White presented sufficient evidence for the jurors to determine that Burlington Northern suspended her because of the EEOC charge.

Finally, the district court denied Burlington Northern's motion for a new trial because it did not show that the verdict was against the clear weight of the evidence.

The district court entered an order granting 80% of White's requested attorney's fees. The district court's initial order neglected to award costs and expenses. After White filed a Rule 59(e) motion to amend judgment, the district court entered an amended final judgment awarding attorney's fees and $4,055.28 in costs and expenses.

II. Factual Background

On June 23, 1997, Burlington Northern hired Sheila White as a maintenance of way track laborer ("track laborer") at the Tennessee Yard in Memphis, Tennessee. Track laborers engage in physically demanding tasks, including maintaining and oiling railway switches, and doing repairs. Before beginning work, Cathy McGee, Burlington Northern's Human Resources Manager, and Marvin Brown, roadmaster of the Tennessee Yard, interviewed White. During her interview, White said that she had extensive prior fork-lift experience.

Following her hire, Brown directed White to operate the stationary forklift at the Tennessee Yard. Before White's hire,

Ralph Ellis carried out these forklift responsibilities at the Tennessee Yard. Besides doing forklift work, Ellis had also worked on a mobile track gang, work that gave him additional per diem pay. After Burlington Northern hired White, Brown gave Ellis the option to continue working on the mobile gang or work on the forklift, but forfeit his per diem rate. Ellis chose to continue working on the mobile gang, thus creating the need to assign an employee to the forklift responsibilities.

White complained that Burlington Northern employees treated her differently because of her sex, female. She alleged that between July 2, 1997, and September 16, 1997, her foreman treated her differently from male employees, and twice made inappropriate remarks. White reported her allegations to Brown, her foreman's supervisor. Brown contacted McGee, and McGee investigated the complaint. As a result of the investigation, Burlington Northern suspended the foreman without pay for ten days on September 26, 1997, and ordered him to attend a sexual harassment training session.

On the same day, roadmaster Brown reassigned the forklift responsibilities to Ellis, the employee who formerly operated the forklift. Burlington Northern says that Brown assigned Ellis to the forklift operator's position because male employees, senior to White, complained that the railroad gave her preferential treatment because she was female. Specifically, the appellant says these men complained that White, who had less seniority, received the forklift job assignment instead of working full-time on the tracks. The railroad said it first learned of these complaints during its sexual harassment investigation of White's foreman. Brown testified on direct examination that he changed White's job assignment based on complaints from senior employees and because Ellis had greater seniority.

On cross examination, Brown identified the complaining employees as Ralph Ellis, Daryl Knight and Gary Augustus. Ellis and Knight were senior to White. Augustus was junior to Ms. White. Of the three, only Ellis had the qualifications to operate a forklift. During cross examination, Brown testified that he knew of the mens' complaint about White's forklift position before White complained to him about sexual discrimination and harassment. However, Brown did not transfer White until after she complained about sexual discrimination and harassment.

Brown's trial testimony is inconsistent with Burlington Northern's interrogatory response. In that response, the railroad said that it transferred White from the forklift position because a senior employee claimed the job according to the collective bargaining agreement. Burlington Northern also stated that it had concerns about potential repercussions from the Union for giving White, a less senior employee, the forklift responsibilities. But, Brown testified that seniority did not govern the forklift job. Instead, he could place anyone in that position. In addition, neither the union, nor anyone else, filed a grievance about White's operation of the forklift.

On October 10, 1997, White filed a discrimination charge with the EEOC alleging sexual discrimination and retaliation. On December 4, 1997, she filed a second charge of discrimination with the EEOC alleging retaliation. In her second EEOC filing, White alleged that Brown had placed her under surveillance and checked on her daily activities. The EEOC mailed the charge of discrimination to Brown on December 8, 1997.

On December 11, 1997, Percy Sharkey, White's foreman, removed White from service for insubordination. On that day, White and her track gang were working in Blytheville, Arkansas supporting a regional tie gang. At trial, Sharkey testified that he directed another employee to ride with him in

his truck because he wanted that employee to help him with some heavy lifting. Sharkey assigned White to ride in another truck with another foreman. She refused, claiming that she had seniority over the employee accompanying Sharkey.

As a foreman, Sharkey could remove White from service for insubordination pending a full investigation. Before removing White from service for insubordination, Sharkey unsuccessfully tried to reach his immediate roadmaster. He then called Brown for advice. At Brown's request, Sharkey wrote a description of the incident and faxed it to Brown. After reviewing Sharkey's written statement, Brown told Sharkey that White's conduct justified her removal from service.[2] At trial, Sharkey testified that Brown told him to pull her out of service for insubordination.[3]

Once Burlington Northern removed her from service, White and her union filed a grievance for her suspension. Under the terms of the union contract, if White did not file a grievance within fifteen days of her removal, the railroad could have fired her. In response to the grievance, Burlington Northern conducted an internal investigation. After inves-

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[2] Brown testified at trial:

> After I reviewed this document, I told Mr. [Sharkey] that according to what he had wrote in this document that she was being insubordinate and if he felt that she was being insubordinate and she continued to refuse to do what he said, to pull her out of service for insubordination, and we would—pending an internal investigation through the organization, and that's it.

(Brown Trial Test., J.A. at 108).

[3] White testified at trial:

> [S]o after we loaded the plates, he decided to go back to the toolhouse and make a phone call, and he called Memphis and he came back out to the truck and told me that I was—suspended, insubordinate, I can hardly say that word, but suspended, and he told me Brown told him to send me home, back to Memphis.

(White Trial Test., J.A. at 210).

tigating the grievance, Burlington Northern concluded that Sharkey overreacted and that White's conduct was not insubordination. On January 16, 1998, the railroad reinstated White to full service with all back pay, including overtime pay and benefits that she was entitled to during the suspension. This made her whole.

III. Argument

A. Motion as a Matter of Law

1. Standard of Review

We review *de novo* the district court's denial of a Rule 50(b) motion for judgment as a matter of law. *Smith v. Leggett Wire Co.*, 220 F.3d 752, 758 (6th Cir.2000). We grant the motion only if, in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could only find in favor of the moving party. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir.2001). In making our determination, we review all of the evidence in the record, drawing all reasonable inferences in favor of the non-moving party, making no credibility determinations, and weighing no evidence. *Id.* at 600 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

Besides this standard, *Reeves* directs courts to "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097. Further, we give credence to the evidence favoring the non-movant, as well as that evidence supporting the moving party that is uncontradicted and unimpeached, where the evidence comes from disinterested witnesses. *Id.* Finally, the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Id.* at 147, 154, 120 S.Ct. 2097.

2. Elements of Title VII Retaliation Claim

Title VII prohibits retaliation by an employer where an individual has engaged in protected activity. 42 U.S.C § 2000e-3(a). The anti-retaliation provision provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

A plaintiff can establish retaliation under Title VII without proof by direct evidence. In such cases, we have adopted the burden shifting approach initially identified in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Hollins v. Atl. Co.*, 188 F.3d 652, 658 (6th Cir.1998).

Under this standard, White must first establish a prima facie case of retaliation. She must show: 1) she engaged in an activity protected by Title VII; 2) the defendant knew of the exercise of her civil rights; 3) the defendant took an employment action adverse to the plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action. *Hollins*, 188 F.3d at 661 (citing *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 877 (6th Cir.1991)).

If White establishes a prima facie case of retaliation, the burden of production shifts to Burlington Northern to articulate a legitimate, non-discriminatory reason for taking the adverse employment action. Burlington Northern's burden is one "of producing an explanation to rebut the prima

facie case—i.e., the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (internal citation omitted). Once the employer produces such evidence, the burden shifts to the plaintiff to show that the reasons the employer offered were a pretext for retaliation. *See id.* The plaintiff at all times retains the burden of persuading the trier of fact that the employer intentionally retaliated in violation of Title VII. *See id.* at 507-08, 113 S. Ct. 2742.

3. Adverse Employment Action

On appeal, Burlington Northern says White did not establish that the reassignment of the forklift responsibilities and her temporary suspension were "adverse employment actions."

"[A] plaintiff must identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII." *Hollins*, 188 F.3d at 662 (citing *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir.1996) and *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir.1993)). A material adverse change includes a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *See Kocsis*, 97 F.3d at 886 (adopting factors described in *Crady*, 993 F.2d at 136); *see also Hollins*, 188 F.3d at 662. Importantly, a change in employment conditions "'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Kocsis*, 97 F.3d at 886 (quoting *Crady*, 993 F.2d at 136).

a. Forklift Operation Issue

Burlington Northern says White did not suffer an adverse employment action when Brown took her off forklift duty because this reassignment was a non-actionable lateral job transfer.

We have stated that "[r]eassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Kocsis*, 97 F.3d at 885. Further, we have held that where a job transfer has the same duties, pay, and grade level but requires an additional 20-minute commute, the plaintiff did not satisfy the adverse employment action element. *Darnell v. Campbell County Fiscal Court*, 731 F.Supp. 1309, 1313 (E.D.Ky.1990), *aff'd*, 924 F.2d 1057 (6th Cir.1991). Finally, we have held that a sales representative did not suffer an adverse employment action when her employer reassigned her to territory 80 to 100 miles from her home where she had previously worked the same territory between 30% and 40% of the time. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir.2002).

Other courts have also held that a lateral job transfer is usually not an adverse employment action. *See, e.g., Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1420 (8th Cir.1995) (job transfer with poor working conditions was not an adverse employment action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir.1994) (job transfer without loss in salary benefits or responsibilities was not adverse action though the plaintiff had to report to a former subordinate); *Murphy v. Yellow Freight Sys., Inc.*, 832 F.Supp. 1543, 1550-51 (N.D.Ga.1993) (no adverse employment action found where plaintiff did not receive as high of a pay raise as she thought she deserved, she received night and weekend shifts where that was a normal alternating assignment for all employees, employer told her that her clothing violated the company's dress code, and plaintiff complained that her supervisor

documented their conversations in writing and put his notes in her personnel file); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir.1994), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 733, 130 L.Ed.2d 636 (1995) (transferring female employee to another shift was not an adverse employment action); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir.1994) (reassigning plaintiff to more stressful job was not an adverse action).

Finally other courts have noted that a plaintiff's subjective perception that one position is more desirable than another is not controlling. *Kelleher v. Flawn*, 761 F.2d 1079, 1086 (5th Cir.1985).

Here, Burlington Northern argues that White's reassignment to track labor duties did not materially disadvantage White. First, White maintained her position as a track laborer throughout her employment with the railroad. Even when assigned responsibility for operating the forklift, White also worked on track maintenance tasks. Further, White never suffered a termination, a demotion evidenced by a wage or salary decrease, a less distinguished job title, a material loss of benefits, or significantly diminished material responsibilities.

White does not dispute that most lateral transfers are not adverse employment actions. Instead, she says the district court properly found that White suffered an adverse employment action because of the "unique circumstances" language in *Hollins*.[4] 188 F.3d at 662 (quoting the *Crady*

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[4] The district court's opinion on this issue reads as follows:

> Plaintiff presented sufficient evidence to support a finding that moving Plaintiff from operating a forklift to working on the track constituted an adverse employment action. This situation is covered by the "indices that might be unique to a particular situation" language of *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir.1999). Plaintiff offered sufficient proof for the jury to find that the unique circumstances surrounding Plaintiff's change in job

factor that a materially adverse change in employment might be indicated by "other indices that might be unique to a particular situation"). Specifically, the district court held that White presented sufficient evidence to show that Brown's reassignment of her to the physically demanding track work from the light forklift duty was an adverse action. White also contends that finding "Brown's action to transfer Ms. White does not qualify as an adverse employment action would have a chilling effect on reporting discrimination."

We disagree. The fact that forklift duty is less physically demanding than track maintenance work does not make White's reassignment a cognizable adverse employment action. The railroad hired White as a track maintenance worker. One of her explicit job responsibilities was to maintain the railroad tracks. We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her. Moreover, contrary to the dissent's assertion, a job transfer that involves heavy lifting and more physically demanding tasks is not a demotion. In fact, in a disability discrimination case, we held that a nurse's reassignment from a nurse supervisor position to a unit nurse position was not a materially adverse change in employment although the new duties involved more physically demanding tasks. We made this holding because the nurse did not lose any pay, benefits, or prestige. *Kocsis*, 97 F.3d at 886-87. We find *Kocsis*

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duties from operating the forklift to working on the track constituted an adverse employment action under the relevant case law. In particular, evidence presented at trial supported a finding that the job responsibilities involved with operating a forklift were light while those responsibilities involved in working on the track were quite heavy and physically demanding. The "unique circumstances" language of *Hollins* applies to these facts, and Defendant has argued no persuasive reason why plaintiff's proof at trial is insufficient to support the jury's finding.

(J.A. at 70-71).

applicable here because cases involving disability and age discrimination are instructive in Title VII cases. *Kocsis*, 97 F.3d at 885.

Therefore, we find that White's reassignment away from forklift responsibilities is not an adverse employment action.

b. Removal From Service

Next, Burlington Northern says that the district court erred when it found that White's suspension constituted an adverse employment action. Burlington Northern argues that White's suspension was not the final employment decision required for an adverse employment action because the railroad reinstated White with full back pay, including overtime pay, and full benefits. Burlington Northern primarily relies on *Dobbs-Weinstein v. Vanderbilt University* as support for this proposition.

In *Dobbs-Weinstein*[5] we held that a suspension was not an adverse employment action. *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 545-46 (6th Cir.1999). Moreover, a reinstatement which puts the plaintiff in the position she would have been in absent the suspension, constitutes the "ultimate employment decision" thereby negating a potentially adverse intermediate employment decision. *Id.*

In *Dobbs-Weinstein*, a professor sued Vanderbilt University under Title VII for an allegedly discriminatory denial of tenure. *Id.* at 543-44. The philosophy department initially recommended tenure be given, but the Dean rejected the department's recommendation, and denied plaintiff's tenure.

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[5] In relying on *Dobbs-Weinstein*, we note that it involved a discrimination claim, not a retaliation claim. Both claims, however, share a common element, "adverse employment action." Moreover, in *Hollins*, a retaliation case, we set forth the factors to use in an adverse employment action case after borrowing these factors from an age discrimination case and a disability discrimination case. Therefore, we conclude that *Dobbs-Weinstein* is applicable here.

Id. at 543. Through an internal grievance process, Vanderbilt reversed the Dean's decision. *Id.* at 544. The university promoted plaintiff to associate professor with tenure retroactive to the date the Dean should have granted tenure. *Id.* The university also gave the professor all back pay retroactive to the date the Dean should have promoted her. *Id.* Despite the favorable result she received, the professor sued Vanderbilt for the interim emotional distress she suffered, potential damage to her reputation, and interest on the back pay. *Id.*

The trial court in *Dobbs-Weinstein* granted the defendant summary judgment, and this Court affirmed. *Id.* at 545. Although the review process of the tenure denial lasted eighteen months, this Court held that the professor was not entitled to recover because she did not suffer an ultimate adverse employment decision as the university ultimately gave tenure. *Id.* at 545-46; *see also Jackson v. City of Columbus*, 194 F.3d 737, 752 (6th Cir.1999) (holding that the thirty-day suspension of an African American police chief did not constitute an adverse employment action because the decision did not ultimately constitute "a termination of employment, a change in salary, demotion, loss of benefits, decreased work hours, or significantly diminished material responsibilities."). We reasoned that employees should not challenge intermediate employment decisions when the ultimate employment decision is not adverse to the plaintiff. *Dobbs-Weinstein*, 185 F.3d at 546. We further elaborated:

> Dobbs-Weinstein has not created a claim for employment discrimination by suing Vanderbilt before the final decision on her promotion and tenure was made. She argues that her claims for emotional distress and professional reputation damages mean that her claim is viable, but that argument places the cart before the horse. A claim for potentially recoverable damages does not transform Venable's decision into an "adverse

> employment action." *Dobbs-Weinstein succeeded in the grievance process, and Vanderbilt's final decision was to grant her tenure. She has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII.* To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.

Id. (emphasis added).

Other courts have also held that an adverse employment action must be based on an "ultimate employment decision" by an employer. *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997), *cert. denied*, 522 U.S. 932, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.) (*en banc*), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981) (holding that Title VII prohibits only "ultimate employment decisions" which are retaliatory and not "interlocutory or mediate decisions."); *see also Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 755 (4th Cir.), *cert. denied*, 519 U.S. 818, 117 S.Ct. 70, 136 L.Ed.2d 30 (1996).

The district court sought to distinguish *Dobbs-Weinstein*. The district court noted that the *Dobbs-Weinstein* professor never stopped working and never suffered a break in payment.[6] Here, White lost all pay and benefits immediately

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[6] The district court explained that "[w]hereas the plaintiff in *Dobbs-Weinstein* was initially informed that her tenure had been denied and that her contract would not be renewed at the end of the year, Plaintiff in the present case was immediately suspended without pay. There is a marked difference between being told that employment will cease in a couple of months and being immediately suspended indefinitely without pay or other benefits." (J.A. at 72).

upon her suspension. The district court also found crucial the fact that White faced permanent termination in contrast to the professor.

We reject these arguments. First, although the professor continued to work during the appeals process, she did lose the increased pay and benefits associated with tenure. In fact, when the university granted the professor's tenure, it also gave her retroactive back pay to the date that it should have granted tenure. This period was 18 months long. By contrast, White waited only thirty-seven days before the railroad reinstated her and gave her back pay. We also reject White's arguments that the fact that her suspension occurred during the Christmas holiday season makes her suspension unique. White misplaces this argument. While emotional injuries may be affected by the season, it does not make the suspension a sufficiently adverse employment action.

We also note that contrary to the district court's assertion, the *Dobbs-Weinstein* plaintiff also faced termination if she did not affirmatively appeal the tenure denial. At the time the university notified the professor of the tenure denial, it also informed the professor of her termination, effective at the end of the academic year. The fact that the *Dobbs-Weinstein* plaintiff bore the onus of initiating the review process did not alter our conclusion there that the professor had not suffered an adverse employment action. We fail to see why the result should be any different here. Further, the employment action complained of must be "the ultimate employment decision." Here, the review process resulted in White's reinstatement. Therefore, her suspension was not "the ultimate employment decision."

More important, the *Dobbs-Weinstein* professor did lose pay for approximately three months from August, 31, 1995 to November 1995. *Dobbs-Weinstein*, 185 F.3d at 544 (noting that in November 1995 after the university reversed the tenure denial, the professor "was given full pay for the period

after August 31, 1995, when payment for her previous contract had ended."). Following the tenure denial, the professor's appointment expired in August 1995, the end of the academic year. The university reversed the denial of the tenure in November 1995. Therefore, the *Dobbs-Weinstein* plaintiff received no pay from the university for three months. Yet, we found that the reinstatement with back pay and benefits stopped the original tenure decision from being an adverse employment action.

Additionally, the district court's reasoning ignores the inescapable fact that Burlington Northern ultimately reversed White's suspension and reinstated her with full back pay and overtime. Burlington Northern's suspension of White was the first step in the employment decision making process. But, it was only an interim decision. The railroad had a grievance process available to challenge such decisions. The internal investigation was the next step in the chain. The railroad timely completed this investigation and reinstated White with full back pay and benefits thirty-seven days after her suspension. Therefore, White's appeal of her suspension prevented Burlington Northern's interim decision from becoming final. The dissent in *Dobbs-Weinstein* supports this position:

> Unlike the majority, I am not concerned that permitting Dobbs-Weinstein to go forward with her action will encourage premature litigation concerning adverse initial employment decisions. *As long as an employer's appeal or grievance process operates in a timely fashion, the employee generally will not suffer a materially adverse action. This is particularly true if the employer refrains from terminating the employee in the interim, but, even if the employee is wrongfully terminated, voluntary*

> *reinstatement and provision of back pay will limit or possibly even obviate the recovery of compensatory damages.*

Id. at 548 (Moore, J., dissenting) (emphasis added).

The cases White cites in support of her contention that temporary suspensions are adverse employment actions are distinguishable. The employer upheld all of the suspensions in those cases. *See Gribcheck v. Runyon*, 245 F.3d 547, 549 (6th Cir.2001) (upholding fourteen day suspension); *McKethan-Jones v. Ohio Dept. of Health*, 7 Fed.Appx. 475 (6th Cir.2001); *Dowell v. Rubin*, 234 F.3d 1268 (6th Cir. Oct.31, 2000) (upholding five day suspension without pay). Therefore, the employee did not recover lost wages and benefits.

White's final argument is that *Dobbs-Weinstein* is limited to academic tenure cases. We disagree. In fact, we cited to *Dobbs-Weinstein* in a racial discrimination claim outside the tenure setting, for the proposition that a police chief did not suffer an adverse employment action where he suffered no "final or lasting harm." *See Jackson*, 194 F.3d at 752.

Additionally, the dissent says that *Dobbs-Weinstein* is inapplicable outside the tenure setting because we relied exclusively on tenure decisions in making our determination in *Dobbs-Weinstein*. Again, we disagree. In fact, we cited a non-tenure case as support for our conclusion that a Title VII plaintiff must suffer an 'ultimate employment decision.' *Dobbs-Weinstein*, 185 F.3d at 545 (stating "we are not alone in focusing on whether Dobbs-Weinstein can present a case based on an 'ultimate employment decision'" and citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.1981) (postal discrimination case)).

Finally, we also disagree with the dissent's assertion that a suspension for a university professor does not have as severe an impact as a suspension for a blue collar employee. The

dissent ignores the adverse impact that a suspension or denial of tenure has on a professor's academic reputation. This reputational consequence, which exists to a lesser degree in the blue collar setting, can be more damaging in the long-term to a university professor than a temporary suspension for a blue collar worker. Accordingly, we find that White failed to show an adverse employment action sufficient to make out a Title VII retaliation claim.

4. Legal Sufficiency of the Evidence

Next, Burlington Northern says that the jury had insufficient evidence to find in favor of White on her retaliation claim. Since we find that White did not meet her prima facie case of retaliation, this issue is moot.

B. Attorney's Fees

Again, because we hold that White did not present sufficient evidence that she suffered an adverse employment action, the attorney's fee issue is moot.

C. Jury Instructions on Punitive Damages

On cross-appeal, White says that the district court erred when it instructed the jury that "[p]unitive damages may be considered if and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently." Because White did not show the required prima facie elements of retaliation, this issue is moot.

IV. Conclusion

We find that the appellant's transfer of Sheila White to a different duty within her same job classification was not an adverse employment action sufficient to support a Title VII claim. Similarly, we find that the appellant's temporary suspension of White, a suspension that it soon overturned with back pay, was also not an adverse employment action

sufficient to support a Title VII claim. Since White does not show an adverse employment action, she fails to make out a prima facie case. We therefore reverse the district court and set aside the jury's verdict. Because we set aside the jury's verdict, the issues concerning the jury instructions and attorney's fees are moot. The judgment of the U.S. District Court for the Western District of Tennessee in case 00-6780 and 01-5024 is REVERSED in part, and REMANDED to set aside the jury verdict.

CLAY, *Circuit Judge*, dissenting.

The majority has determined that in light of *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir.1999), Defendant did not take materially adverse employment action by removing Plaintiff from her position, assigning her more arduous work, and suspending her without pay for thirty-seven days before the suspension was later reversed with back pay. Because the majority's opinion is not supported by our precedent or the record below, I respectfully dissent.

Plaintiff began working for Defendant on June 23, 1997 as a track laborer, but Roadmaster Brown testified that he decided to offer her a position operating a forklift. As a forklift operator, Plaintiff performed other duties, but this was because her primary duty of operating the forklift did not take all day. Plaintiff subsequently submitted an internal complaint about the sexual harassment of her by Foreman Bill Joiner. On the very day that Plaintiff was notified of Joiner's suspension for the sexual harassment, Brown transferred Plaintiff from her forklift operator job to other track laborer duties full-time, despite a lack of complaints about her performance on the forklift. The transfer was allegedly due to complaints from other workers that Plaintiff was not sufficiently senior for the forklift position. Yet Brown replaced Plaintiff with Ralph Ellis, the man who earlier had voluntarily given up the forklift, and who did not complain about Plaintiff being given the job. No other qualified workers senior to Plaintiff were available to run the forklift.

After Plaintiff was removed from the forklift position, she filed two EEOC complaints, alleging, among other things, that the removal was in retaliation for the sexual harassment complaint she had filed. Only three days after a copy of the second complaint was sent to Roadmaster Brown, Foreman Sharkey suspended Plaintiff for insubordination, and even after Brown determined that Sharkey had overreacted and

even though Brown could have reversed Sharkey's decision, he declined to do so. Instead, Plaintiff filed a grievance with the union, a full internal investigation ensued, and a hearing officer determined what Roadmaster Brown knew all along-that Sharkey had overreacted and that Plaintiff did not commit insubordination. Meanwhile, Plaintiff's co-worker, Greg Nelson, who arguably was the most disobedient in the entire incident, was not suspended or disciplined in any manner for failing to follow Sharkey's orders.

1. Adverse Employment Action

Like the majority, I recognize that this Court requires a materially adverse employment action for a plaintiff to state a *prima facie* case of Title VII retaliation. Unlike the majority, however, I believe that Plaintiff satisfied her requirement in that regard. In view of the facts and circumstances, Plaintiff's effective demotion and subsequent suspension, even with reinstatement with back pay, together constituted the requisite materially adverse employment action.

a. Removal from the Forklift Position

With regard to Roadmaster Brown's removal of Plaintiff from the forklift job, I disagree with the majority's acceptance of Defendant's slant on the facts. Although it is true that Plaintiff was initially hired as a track laborer, and she sometimes performed other duties because operating the forklift, in the words of Defendant, "was not a fulltime job" (Defendant's Br. at 5), Defendant has mischaracterized the forklift job as a happenstance duty to be farmed out to employees in a random fashion. In fact, the forklift job was not merely an occasional task; it was an actual job which, according to Roadmaster Brown's own testimony, was advertised to the railroad employees. When Roadmaster Brown took Plaintiff off the forklift, he did not merely reshuffle her responsibilities; he took away her job. Plaintiff, in effect, experienced not a mere "lateral transfer," as the

majority states, but a demotion, because, for the same pay, her work became much more strenuous. As Plaintiff testified, track labor required more physical exertion and was "much dirtier" than the forklift job. (J.A. at 201.) Some of the dirty aspects of the job include "picking up tools, oiling them from down on the ground where sometimes it require[d] you to get on your knees and hands." (J.A. at 202.) Adverse aspects also included prolonged sun exposure.

The majority asserts that under *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886-87 (6th Cir.1996), job reassignments that include some increased physical labor are not sufficient to constitute an adverse employment action. *Kocsis*, however, is distinguishable from the matter at hand inasmuch as unlike in *Kocsis*, where the duties of the plaintiff nurse increased only with respect to the "frequency [of] lifting and maneuvering residents," *id.* at 879-80, Plaintiff's reassignment to the track laborer position involved an increase in the frequency of objects lifted as well as an increase in the weight of the objects lifted. Furthermore, Plaintiff's work as a track laborer required that she be exposed to the sun more often than before, and involved much dirtier work than her previous position as a forklift operator. Therefore, the increased physical demands brought about by the reassignment of Plaintiff to the track laborer position went well beyond that of the increased physical demands experienced by the plaintiff in *Kocsis*, and went well beyond a "mere inconvenience" as described in *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999). Similarly, Plaintiff's reassignment to the track laborer position did not constitute an ordinary lateral job transfer, thus taking this case out of the reach of those cases finding that a lateral transfer does not constitute an adverse employment action. *See Policastro v. Northwest Airlines*, 297 F.3d 535, 540 (6th Cir.2002); *Darnell v. Campbell County Fiscal Court*, 731 F.Supp. 1309, 1313-14 (E.D.Ky.1990); *see also Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1420 (8th Cir.1995); *Flaherty*

v. Gas Res. Inst., 31 F.3d 451, 457 (7th Cir.1994); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir.1994); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir.1994). Simply stated, Plaintiff's reassignment from a forklift operator to a track laborer involved material alterations of Plaintiff's job responsibilities thus constituting an adverse employment action for purposes of establishing a *prima facie* case of retaliation under Title VII. *See Hollins*, 188 F.3d at 662.

b. Thirty-seven Day Suspension

Plaintiff's thirty-seven day suspension constituted an adverse employment action as well. First of all, there is authority in this Circuit that a temporary suspension can amount to an adverse employment action. In *Gribcheck v. Runyon*, 245 F.3d 547, 551 (6th Cir.2001), this Court held that the plaintiff suffered an adverse employment action when he was suspended without pay for fourteen days and did not receive back pay. On the other hand, as the majority notes, a temporary suspension with pay is not an adverse employment action. *See Jackson v. City of Columbus*, 194 F.3d 737, 752 (6th Cir.1999). The unresolved question for purposes of this case is whether a suspension without pay, coupled with a subsequent reinstatement and back pay, should be classified as an adverse employment action.

The majority claims this question was answered by the reasoning of *Dobbs-Weinstein*, because the plaintiff in that case received all back pay during the time she was not working for the university, and therefore was "made whole." However, it is apparent that key to this Court's decision in finding no adverse employment action was that the situation involved a denial of tenure. *Dobbs-Weinstein*, 185 F.3d at 545-46. Indeed, the Court relied primarily on tenure

decisions in making its determination.[1] *Id.* at 546 (citing several district courts that had reached similar conclusions in discrimination cases based on delayed grant of tenure). The Court also noted that "tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally." *Id.* at 545 (citing *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir.1984)). Such considerations included the following:

> the lifetime nature of the contract, the fact that the decisions are often non-competitive, the decentralized nature of the decision-making process, the multiplicity of facts in the decision, the fact that tenure decisions are often quite contentious, and the reluctancy of courts to review the merits of a tenure decision.

Id. (citing *Zahorik*, 729 F.2d at 92-93). The Court further explained, "Because tenure decisions are so complex and potentially contentious, universities are well-served to have a grievance procedure for individuals wishing to appeal any of the many intermediate decisions or evaluations made during the tenure review process." *Id.*[2]

The majority's opinion implies that *Dobbs-Weinstein* stands for the proposition that subsequent reinstatement with back pay vitiates any earlier wrong a plaintiff may have suffered. If this is what *Dobbs-Weinstein* intended to hold, it could have done so simply enough. Instead, it explained that tenure decisions present a complex set of challenges that

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[1] Contrary to the majority's assertion, the dissent does not claim that *Dobbs-Weinstein* relied *exclusively* on tenure decisions, but that it relied *primarily* on them.

[2] Other circuits also have acknowledged the unique nature of tenure decisions. *See Tanik v. S. Methodist Univ.*, 116 F.3d 775, 776 (5th Cir.1997); *Brousard-Norcross v. Augustana Coll. Ass'n*, 935 F.2d 974, 976 (8th Cir.1991); *Kumar v. Bd. of Trs., Univ. of Mass.*, 774 F.2d 1, 11 (1st Cir.1985); *Zahorik*, 729 F.2d at 92-93 (2d Cir.1984).

justify a mechanism designed to reverse earlier erroneous tenure decisions. Therefore, the initial decision of the dean not to concur in recommending the plaintiff for tenure was not a final decision upon which the plaintiff could base an adverse employment action, even though her contract terminated and she was out of work during part of the review process. Despite the lack of authority from this Court equating a denial of tenure with a suspension, the majority ignores the *Dobbs-Weinstein* court's underlying reasoning and mistakenly equates the situations based on similar outcomes: reinstatement with back pay.

The majority's use of the dissent in *Dobbs-Weinstein* is misplaced. *See* 185 F.3d at 548. The dissent was speaking mainly in the context of tenure decisions, which as explained earlier, constitute a unique area in Title VII cases because of the nature of those decisions. Therefore, a "timely fashion" in the tenure context differs from that in the more conventional employment context. In other words, an immediate thirty-seven-day suspension for a blue collar worker, who may be living from paycheck to paycheck, can actually have a more severe impact on the worker than a sixty-day lapse for a university professor who had been warned well ahead of time that she would not receive tenure and that her employment contract would expire. The majority, however, again mistakenly equates the tenure denial scenario with that of employment suspensions in non-academic contexts.[3]

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[3] The majority has mischaracterized the dissent as saying that a blue-collar worker's suspension results in a more severe impact than a denial of tenure for a university professor. To be clear, the dissent makes no such categorical statement. The majority had suggested that the *Dobbs-Weinstein* dissent supported its contention that Plaintiff's thirty-seven-day wait for reinstatement and back pay paled in comparison to the delay experienced by the *Dobbs-Weinstein* plaintiff, who had to wait over sixty days and was still denied Title VII relief. To the contrary, the point of the dissent is that a delay in the tenure denial context, or the uncertainty experienced by a professor as a result of the non-renewal of an

Even if one finds the situations appropriate for comparison, there are material differences between *Dobbs-Weinstein* and the present case. The plaintiff in *Dobbs-Weinstein* was on notice that her job contract would not be renewed. Although there was an interim period where she was not working and received no pay, this was because the relevant contractual period had lapsed, and she was aware of this possibility several months ahead of time. In the present case, Roadmaster Brown, a senior level employee at the railroad, decided to sustain Foreman Sharkey's suspension, despite his belief that the suspension was not warranted. The suspension was immediate, and Plaintiff's pay and benefits were immediately terminated without warning, pending an investigation. Suddenly, Plaintiff had no income with which to pay her bills, and was left in limbo to await a determination as to her future at the railroad. The adverse nature of the suspension was not reversed simply because she subsequently received retroactive pay. While the fact that Plaintiff was reinstated might have mitigated her damages, it was not dispositive of whether an adverse employment action occurred. *Dobbs-Weinstein* is properly distinguishable, because that case involved not a suspension in an ordinary employment context, but a denial of tenure in an academic setting, which was integral in the Court's holding.

At any rate, even if these employer actions individually were not sufficiently adverse, the conduct in the aggregate created a situation that constituted a materially adverse employment action. Although the majority considered the two actions individually, several employer actions, taken together, may also constitute an adverse employment action. *See Ford v. Gen. Motors Corp.*, 305 F.3d 545, 554 (6th Cir.2002) (holding that plaintiff's increased workload,

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employment contract, should not be equated with the situation of an employee who receives an immediate suspension in a non-academic setting.

heightened scrutiny, and constructive discharge, taken together, constituted materially adverse employment action); *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 50 (1st Cir.1999) (holding that several employment actions, "viewed in the aggregate, could be considered 'materially adverse'"). Certainly this Court does not recognize *de minimus* actions to be materially adverse. *See Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir.2000). However, the suspension and job change, taken together, were more than *de minimus*; they were materially adverse within the meaning of Title VII.

2. Other Elements in a Title VII Claim

Although not addressed by the majority, the remaining relevant element necessary for a plaintiff to establish a *prima facie* case of retaliation is a causal connection between the Title VII-protected activity taken by the employee and the adverse employment action taken by the employer. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir.2000). This Court has held that such a causal connection may be shown through circumstantial evidence, such as a proximity of time between the two events. *See, e.g., Fenton v. HiSAN*, 174 F.3d 827, 832 (6th Cir.1999) (citing *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir.1987)). Most notably, Plaintiff was removed from the forklift job almost immediately after her complaints about Foreman Joiner's sexual harassment and discrimination resulted in his suspension. Then, when Plaintiff filed an EEOC complaint about this retaliatory move, Roadmaster Brown allowed Foreman Sharkey to suspend her, knowing the suspension was unwarranted, only three days after a copy of the EEOC complaint was sent to Brown. Moreover, testimony at trial indicated that Sharkey told Plaintiff that Brown considered her a troublemaker, and Sharkey even admitted that he was not "crazy" about women working at the railroad. Therefore,

more than sufficient evidence existed to support a causal connection between Plaintiff's complaints and Defendant's subsequent adverse actions.

After the employee establishes a *prima facie* case of retaliation, the burden shifts to the employer to assert a non-discriminatory reason for the adverse action. *Ford*, 305 F.3d at 553. Once the employer has done so, the burden shifts back to the employee to demonstrate that the asserted reason is a pretext for retaliation. Defendant contends that there was a complete absence of proof as to whether its reasons for the employment decisions were pretextual because Plaintiff failed to rebut the fact that Defendant moved a more senior person to the forklift duties, and that it had received complaints from other senior employees regarding Plaintiff being allowed to operate the forklift as a junior employee.

Defendant's argument is without merit. Numerous inconsistencies surfaced among Defendant's witnesses at trial from which the jury could infer that the reasons proffered by Defendant were pretextual. First of all, Roadmaster Brown testified on direct examination that there had been "a lot of complaints" from senior employees in the maintenance of way department pertaining to Plaintiff, a junior employee, being allowed to work on the forklift, a comparatively light and easy job. (J.A. at 105.) However, on cross-examination, Brown's story changed. He claimed that "one, possibly two senior employees" complained about Plaintiff working on the forklift. (J.A. at 115.) He named these employees as Ellis, Gary Augustus and Daryl Knight. However, Augustus was actually junior to Plaintiff, not senior; Knight, although technically senior to Plaintiff, was hired on the same day as Plaintiff; and Ellis testified that he never made any complaints about Plaintiff operating the forklift and that Brown *requested* that Ellis return to that duty.

Roadmaster Brown's testimony was also inconsistent with Defendant's interrogatory answer as to why Plaintiff had been removed from her forklift operator duties. According to the interrogatory, a track laborer with more experience than Plaintiff had claimed the job pursuant to a collective bargaining agreement (CBA). Brown admitted at trial, however, that the "job" was not governed by the seniority provisions of the CBA and that Brown could have assigned anyone he wanted, including Plaintiff, to the "forklift job." (J.A. at 123-24.) Brown had also earlier stated that Richard Spears, general chairman of the union, called to complain about Plaintiff performing forklift duties. However, Spears testified at trial that he could not recall making any such complaint to Brown and had no record of such a complaint. Foreman Joiner's testimony was also inconsistent. Although he testified at his deposition that he had not heard complaints from co-workers about Plaintiff driving the forklift, he changed his story at trial, testifying to some complaints.

Given these inconsistencies, the jury was entitled to believe that Defendant's proffered explanations were pretextual and that the real reason for Defendant's action was unlawful retaliation. This is particularly so when ruling on a Rule 50 motion because a court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 867 (6th Cir.2001) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). Under the applicable standard of review, Plaintiff adduced sufficient evidence to survive Defendant's motion, and the district court correctly rejected Defendant's arguments.

Conclusion

This Court requires that a materially adverse action "be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Hollins*, 188 F.3d at 662. Plaintiff's

thirty-seven-day suspension and her removal from the forklift position was more than a "mere inconvenience" or otherwise *de minimus* action. In addition, there were sufficient inconsistencies with respect to the reasons provided by Defendant to explain the actions taken against Plaintiff for the jury to infer that the reasons were pretextual. I would therefore affirm the district court's denial of Defendant's motion for judgment as a matter of law.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed Nov. 16, 2000]

No. 99-2733 Ml/Bre

SHEILA WHITE,

Plaintiff,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION
FOR JUDGMENT AS A MATTER OF LAW OR,
IN THE ALTERNATIVE, FOR NEW TRIAL

Before the Court is Defendant's Motion For Judgment As A Matter Of Law Or, In The Alternative, For New Trial filed on September 18, 2000. The parties presented this Title VII case to a jury, and the jury returned a verdict for the Plaintiff on the claim of retaliation. Defendant now seeks either entry of a judgment for Defendant or a new trial pursuant to Federal Rules of Civil Procedure 50 and 59, respectively. For the reasons stated below, Defendant's motion is DENIED.

I. Motion for Judgment as a Matter of Law under Rule 50

Federal Rule of Civil Procedure 50 ("Rule 50") states that

> (b) If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted

> the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59.

The current motion is properly presented to the Court since Defendant moved for judgment as a matter of law after the close of all proof and the Court denied that motion.

The Sixth Circuit has stated that a motion under Rule 50 "should be granted . . . only if reasonable minds could not come to a conclusion other than one favoring the movant." *Williams v. Nashville Network*, 132 F.3d 1123, 1131 (6th Cir. 1997). The inquiry is whether sufficient evidence supported the jury's findings. Fed. R. Civ. P. 50(b); *Williams*, 132 F.3d at 1131. A court must "'indulge all presumptions in favor of the validity of the jury's verdict,' and 'should refrain from interfering with a jury's verdict unless it is clear that the jury reached a seriously erroneous result.'" *Williams*, 132 F.3d at 1131, quoting *Brooks v. Toyotomi Co.*, 86 F.3d 582, 588 (6th Cir. 1996). In considering a Rule 50 motion, a Court may not upset the credibility determinations of the jury or weigh the evidence for itself. *Williams*, 132 F.3d at 1131.

Defendant argues that the jury's verdict in favor of Plaintiff on the claim of retaliation was unsupported by evidence presented at trial. Specifically, Defendant presents three bases for this argument: (1) Plaintiff did not present sufficient evidence to show that either the change in job duties from operating a forklift to working on the track or Plaintiff's suspension in December, 1997, constituted an adverse employment action; (2) Plaintiff failed to show that Defendant's assertion of legitimate, non-retaliatory reasons for Plaintiff's transfer from operating a forklift to working on the track and for her suspension were pretextual; and (3) the temporal difference between Plaintiff's filing of her Equal Employment

Opportunity Commission ("EEOC") charge and her suspension in December, 1997 so great as to not allow an inference of retaliation. However, trial testimony does not support Defendant's argument.[1]

A. Adverse employment action

1. Change from operating a forklift to working on the track

Plaintiff presented sufficient evidence to support a finding that moving Plaintiff from operating a forklift to working on the track constituted an adverse employment action. This situation is covered by the "indices that might be unique to a particular situation" language of *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999). Plaintiff offered sufficient proof for the jury to find that the unique circumstances surrounding Plaintiff's change in job duties from operating the forklift to working on the track constituted an adverse employment action under the relevant case law. In particular, evidence presented at trial supported a finding that the job responsibilities involved with operating a forklift were light while those responsibilities involved in working on the track were quite heavy and physically demanding. The "unique circumstances" language of *Hollins* applies to these facts, and Defendant has argued no persuasive reason why plaintiff's proof at trial is insufficient to support the jury's finding.

2. December 1997 suspension

Sufficient evidence also supports the jury's finding that Plaintiff's suspension in December 1997, constituted an

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[1] As an initial matter, Defendant argues in its brief that Plaintiff failed to meet its burden by "direct evidence." [Def.'s Mem. in Supp. of Mot. for J. as a Matter of Law at pp. 1, 8.] As Plaintiff correctly points out, direct evidence is not required, and Plaintiff may meet its burden through indirect or circumstantial evidence. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000) (holding that proof of violation of Title VII by direct evidence or indirect evidence are mutually exclusive paths; it is sufficient for a plaintiff to prove violation through indirect evidence only).

adverse employment action. Specifically, evidence at trial showed that the suspension was without pay and that termination would have resulted but for the intervention of the union. In its memorandum in support of its motion, Defendant relies heavily upon the Sixth Circuit's decision in *Dobbs-Weinstein v. Vanderbilt University*. 185 F.3d 542 (6th Cir. 1999). In *Dobbs-Weinstein*, the Sixth Circuit held that the plaintiff, who had been denied tenure but then granted tenure after utilizing the university's internal appellate process, had not experienced a "materially adverse employment action." *Id.* at 546. The facts of *Dobbs-Weinstein* are sufficiently different from the present case to distinguish the two. Whereas the plaintiff in *Dobbs-Weinstein* was initially informed that her tenure had been denied and that her contract would not be renewed at the end of the year, Plaintiff in the present case was immediately suspended without pay. There is a marked difference between being told that employment will cease in a couple of months and being immediately suspended indefinitely without pay or other benefits. Furthermore, Plaintiff testified that the suspension without pay occurred near the winter holiday season, a fact which increased the adverse nature of the action. While this fact alone is not dispositive, considering it in conjunction with the other proof supports the legally cognizable characteristic of the suspension as adverse.

Defendant also contends that the suspension was not an ultimate decision as required by the Sixth Circuit in *Dobbs-Weinstein*, but rather an intermediate decision for which Title VII liability does not apply. The present case is distinguishable from the facts in *Dobbs-Weinstein*. In *Dobbs-Weinstein*, the plaintiff continued to work for the defendant while the appeals process was taking place. In the current case, however, Plaintiff's employment was immediately suspended. It was then Plaintiff's burden to appeal the suspension and prove that it was incorrect. While Defendant's actions in reinstating Plaintiff to her prior position and granting her backpay was designed to remedy the discriminatory actions of Defen-

dant's employee, this fact goes to the question of damages and not liability under Title VII.

In addition to this specific procedural difference, the *Dobbs-Weinstein* case dealt with the unique situation of tenure in an academic setting. While tenure decisions are certainly subject to judicial scrutiny under Title VII, they "involve considerations that set them apart form other kinds of employment decisions."[2] *Tanik v. So. Methodist Univ.*, 116 F.3d 775, 776 (5th Cir. 1997); *see also Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984); *Kumar v. Univ. of Mass.*, 774 F.2d 1, 11 (1st Cir. 1985). Plaintiff's experience in the present case was sufficiently distinct from that of the plaintiff in *Dobbs-Weinstein*. Defendant has not adequately persuaded this Court that the holding of *Dobbs-Weinstein* should be extended to cover non-tenure situations. Plaintiff's suspension constituted a legally adverse employment action under Title VII.

B. Pretext

Defendant also argues that Plaintiff failed to present legally sufficient evidence to support the jury's conclusion that Defendant's proffered legitimate, non-retaliatory reason for Plaintiff's change from operating the forklift to working on the track was pretextual. Testimony presented at trial contradicted Marvin Brown's testimony that he placed Ralph Ellis in the forklift operator's role in response to complaints that the forklift should be operated by an employee with more seniority than Plaintiff. The jury simply chose to disbelieve Mr. Brown. Even if the Court would have assessed the witness' credibility differently, the Court cannot substitute its credibility determinations for the jury's determinations.

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[2] Although the Court in *Tanik* was not considering a claim for retaliation, the unique characteristics of tenure decisions logically apply to retaliation as well as other Title VII claims.

C. Temporal distance between EEOC charge and suspension

Defendant's argument on this point is that Percy Sharkey could not have retaliated because of the length of time between Plaintiff's filing of her EEOC charge in October and her suspension in December. While temporal proximity between knowledge of a complaint and alleged retaliatory behavior may indicate whether the action was taken in retaliation for filing a charge alleging discrimination, temporal proximity is a factor to be considered by the fact finder. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 2000 WL 1505090 (6th Cir., Oct. 11, 2000) (specific page references not available). In the present case, Plaintiff presented sufficient evidence, including linking Marvin Brown to the decision to suspend her, to support the jury's determination that Defendant suspended her because of her EEOC charge.

For all these reasons, the Court DENIES Defendant's motion for judgment as a matter of law.

II. Motion for a New Trial under Rule 59

Federal Rule of Civil Procedure 59 ("Rule 59") states in relevant part that

> (a) A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

The standard for granting a new trial is more lenient than the standard for a motion under Rule 50. 9A Wright & Miller, Federal Practice and Procedure § 2531 pp. 302-206 (2d ed. 1995). The Second Circuit has addressed this difference in stating that:

> [u]nlike judgment as a matter of law, a new trial may be granted even if there is substantial evidence supporting the jury's verdict. Moreover, a trial judge is free to

> weigh the evidence himself, and need not view it in the light most favorable to the verdict winner.

DLC Mgmt Corp. v. Town of Hyde Park, 163 F.3d 124, 134 (2d Cir. 1998).

Defendant argues that a new trial is appropriate in this case because the jury's verdict was against the clear weight of the evidence. As the Sixth Circuit has stated, "[i]n determining whether to grant a new trial when the claim is that the verdict is against the weight of the evidence, a district court must compare and weigh the opposing evidence and it must set aside the verdict if it determines that the verdict is against the clear weight of the evidence." *Clay v. Ford Motor Co.*, 215 F.3d 663, 672 (6th Cir. 2000); *see also Holmes v. City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996).

The Court finds no reason to disturb the jury's verdict by ordering a new trial. Defendant has not shown to the Court why any of the jury's credibility determinations were against the clear weight of the evidence and resulted in a miscarriage of justice. In fact, Plaintiff offered credible witness testimony concerning the elements of her retaliation claim. While Defendant offered evidence to counter Plaintiff's proof. No miscarriage of justice resulted. Therefore, the Court DENIES Defendant's motion for a new trial under Rule 59.

III. Conclusion

For the above reasons, Defendant's motion is DENIED in its entirety. The verdict rendered by the jury stands.

Entered this 15 day of November, 2000.

/s/ Jon P. McCalla
JON P. MCCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 00-6780, 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

BURLINGTON NORTHERN & SANTE FE RAILWAY COMPANY,
Defendant-Appellant/Cross-Appellee.

Feb. 11, 2003

Before: MARTIN, *Chief Judge*; BOGGS, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, *Circuit Judges*.

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of these cases en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and the cases are restored to the docket as pending appeals.

It is further ORDERED that the appellant cross-appellee file a supplemental brief not later than Thursday, March 13, 2003 and the appellee cross-appellant file a supplemental brief not later than Monday, April 14, 2003.

The Clerk will schedule these cases for oral argument as directed by the Court.

APPENDIX E

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 26, 2005]

Nos. 00-6780; 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY CO.,
Defendant-Appellant/Cross-Appellee.

Before: BOGGS, *Chief Judge*; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, *Circuit Judges.*

ORDER

Before the court are defendant-appellant/cross-appellee's petition for rehearing from en banc determination or alternatively, to clarify court opinion, defendant-appellant/cross-appellee's motion to stay the mandate and plaintiff-appellee/cross-appellant's motion to issue the mandate in this case.

The petition for rehearing and the motion to clarify opinion are denied. With respect to the motion to clarify, no clarification is needed. Defendant-appellant is not entitled to a new trial on the retaliation issue, an issue on which plaintiff-appellee prevailed in the district court and on appeal. Moreover, as the majority opinion in this case makes clear, the

district court will determine on remand whether a new trial on the punitive damages issue only is necessary. If the district court determines that a new trial on punitive damages is appropriate, then it will also decide questions of admissibility of evidence at that trial, including to what extent evidence pertaining to retaliation should be admitted to permit the jury to decide whether or not plaintiff is entitled to punitive damages.

The motion to stay the mandate is granted, and the motion to issue the mandate is denied. The mandate will issue after 90 days from the entry of this order if no petition for certiorari is filed.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
LEONARD GREEN, Clerk

(3)

No. 05-259

FILED
SEP 22 2005

In the Supreme Court of the United States

BURLINGTON NORTHERN
SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade organization representing the Nation's major freight railroads and Amtrak. AAR's members operate approximately 78% of the rail industry's line haul mileage, produce 94% of its freight revenues, and employ 92% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR believes that its familiarity with the railroad industry, and with the likely consequences of the Sixth Circuit's decision in this case, will aid this Court's understanding of the issues presented here.

The establishment of clear and uniform guidance on the scope of federal employment discrimination law is of substantial concern to AAR's members. Because railroad operations are by their nature decentralized and widely dispersed, the employment practices of AAR's members will be evaluated under the prevailing case law of multiple federal circuits. In addition, AAR's members must rely on their supervisory personnel to oversee more than 170,000 rail employees and ensure the safe and efficient operation of the Nation's railroads in the first instance. Resolution of the disagreement among the federal courts of appeal on the appropriate standard for retaliation claims would allow AAR's members to adopt uniform employment practices and to predict with some certainty their exposure to Title VII liability for vesting critical discretion in their supervisory personnel.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the Association of American Railroads states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

SUMMARY OF ARGUMENT

The lower federal courts all agree that a Title VII plaintiff must allege some genuinely concrete and material adverse employment action in order to bring a retaliation claim, so that employers and the courts are not inundated with federal lawsuits over trivial, day-to-day supervisory decisions. There is an entrenched and significant circuit split, however, over where to draw that line. The Sixth Circuit held in this case that an employee could bring a retaliation claim because her supervisor instructed her to perform one set of tasks—concededly within her job description—rather than a different set of tasks that she preferred and had become accustomed to performing. The Sixth Circuit also held that a temporary suspension can be the subject of a retaliation claim even if that suspension is later reversed by the employer, and even if the employee is reinstated *with full backpay*. Both holdings conflict with the settled law of other courts of appeals.

Large interstate employers need clear and sensible rules in this area of the law so that they can strike an appropriate balance between the need to vest reasonable discretion and authority in front-line supervisors and the need to protect the company from costly employment litigation. Conflicts and uncertainty in the law make it difficult for railroads to adopt uniform policies governing employees who frequently travel across state lines. An anomalous rule in one circuit can accordingly force changes nationwide. In addition, the decentralized and widely dispersed nature of rail operations and the possibility of catastrophic accidents mean that railroads have a particularly strong need to delegate effective and immediate supervisory discretion to supervisors in the field. The Sixth Circuit's decision in this case, however, makes it difficult and risky for a railroad to permit its supervisors to exercise ordinary supervisory authority over any employee who has ever complained about discrimination. That is not consistent with the efficient and safe operation of the Nation's railroads. AAR

therefore respectfully urges this Court to grant review, and to reverse the Sixth Circuit's decision.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S HOLDINGS IN THIS CASE CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

A. The Circuits Are Deeply Divided Over What Kinds Of Supervisory Decisions Can Qualify As "Retaliation" Under Title VII

As the petition for certiorari explains, there is widespread agreement that both the anti-discrimination and anti-retaliation provisions of Title VII must be interpreted to require some concrete and tangible adverse employment action, for otherwise the statute would invite federal litigation over every less-than-glowing performance review, or even over workplace slights as trivial as a supervisor's tone of voice. *See, e.g.*, *Fairbrother v. Morrison*, 412 F.3d 39, 56–57 (2d Cir. 2005) (evaluation of "unsatisfactory" performance insufficient to show adverse employment action absent evidence that evaluation "negatively altered [the plaintiff's] compensation, benefits, or job title"); *Brown v. Brody*, 199 F.3d 446, 458 (D.C. Cir. 1999) (same).

There is, however, a deep and acknowledged split among the circuits over the threshold for showing an adverse employment action in Title VII retaliation cases. The courts of appeals are divided among at least three different standards. At one extreme is the Ninth Circuit, which has adopted the position of the Equal Employment Opportunity Commission ("EEOC") in finding an adverse employment action whenever the employer's action "is reasonably likely to deter the charging party or others from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1237, 1242–43 (9th Cir. 2000). At the other pole are the Fifth and Eighth Circuits, which read the plain language of 42 U.S.C. § 2000e-3(a) to require plaintiffs to show that their employers subjected them to "ultimate employment decisions" or "acts 'such as hiring, granting leave,

discharging, promoting, and compensating.'" *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707, 708–09 (5th Cir. 1997) (citation omitted); *see Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). This requirement echoes the standard this Court adopted for vicarious employer liability for sexual harassment in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760–61 (1998). In that case, this Court explained that the "tangible employment action" sufficient to support vicarious liability must be "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761 (comparing *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993), with *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); and *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

The other circuits have adopted intermediate positions using nominally different standards. The Fourth Circuit, for example, requires "an adverse effect on the 'terms, conditions, or benefits' of employment." *Von Gunten v. Maryland*, 243 F.3d 858, 865–66 (4th Cir. 2001). Six circuits—the First, Second, Third, Seventh, Tenth and D.C. Circuits—require "a materially adverse change in the terms and conditions of employment." *Crady*, 993 F.2d at 136; *see Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 24–25 (1st Cir. 2002); *Fairbrother*, 412 F.3d at 56; *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Medina v. Income Support Div.*, 413 F.3d 1131, 1136 (10th Cir. 2005); *Brown*, 199 F.3d at 457. The Eleventh Circuit has adopted a variation on that theme, requiring plaintiffs to show "a *serious and material* change in the terms, conditions, or privileges of employment." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001) (emphasis in original). The Sixth Circuit in this case viewed itself as joining those courts adopting an intermediate position. Pet. App. at 21a.

Even within the nominally "intermediate" position, however, there are relevant and substantial differences in the threshold of seriousness that the courts of appeals require before finding a "material" change in the terms and conditions of employment. For example, "'[p]erhaps in recognition of the judicial micromanagement of business practices that would result if [courts] ruled otherwise,'" most courts have properly held "'that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes.'" *Brown*, 199 F.3d at 451–52 (citation omitted) (alteration in original).

In *Crady*, the Seventh Circuit held that an employee's alleged "demotion" from an assistant vice president and manager position at one bank location to a loan officer position managing collections at another location did not constitute an adverse employment action, where the employee "would have maintained a management-level position at the same salary and benefits he was already receiving," and there was no showing that the employee's new responsibilities "were less significant than the responsibilities he previously enjoyed." 993 F.2d at 136; *see also, e.g.*, *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (reaffirming that job transfers without significant changes in responsibilities and work conditions are generally not actionable, but stating that material retaliation can occur in non-employment actions); *Harlston*, 37 F.3d at 382 ("Changes in duties or working conditions that cause no materially significant disadvantage" are insufficient.); *Flaherty*, 31 F.3d at 456; *Brown*, 199 F.3d at 455–56. The Seventh Circuit has similarly recognized that asking an employee to perform different *tasks* that are concededly within his or her current job classification is not a material adverse change in the terms and conditions of his employment. *See, e.g.*, *Conley v. Vill. of Bedford Park*, 215 F.3d 703, 712 (7th Cir. 2000) (assigning maintenance employee to paint a pump room for an extended period of time was not an adverse employment action because "the

assignment seems to be well within the scope of normal activities for a Village maintenance worker").

In a similar vein, other courts have recognized that "[m]ere idiosyncracies of personal preference are not sufficient to state an injury" under federal antidiscrimination laws. *Brown*, 199 F.3d at 457. Instead, federal courts have required "that the plaintiff has suffered objectively tangible harm." *Id.* Thus, an employee's perception that a reassignment "was more stressful" was insufficient to show discrimination, when the employee "suffered no diminution in her title, salary, or benefits." *Harlston*, 37 F.3d at 382; *see also, e.g.*, *Flaherty*, 31 F.3d at 457 ("[A] plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action."); *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.").

The Sixth Circuit's decision in this case is clearly inconsistent with other circuits. Under the "ultimate employment decision" standard adopted by the Fifth and Eighth Circuits, there can be no doubt that Petitioner BNSF would have prevailed. Respondent's reassignment was not a change in the actual terms and conditions of her employment and her suspension was not an "ultimate" (*i.e.*, final) decision of the employer. The holding below is also inconsistent with the precedents of at least the Seventh and D.C. Circuits, discussed above, applying the intermediate "material adverse change" test to exclude mere "changes in assignments or work-related duties" that the employee subjectively considers less desirable. *See Brown*, 199 F.3d at 451–52. The rail supervisor's instruction to Respondent that she should focus on other tasks that were concededly within her job responsibilities—indeed, tasks she was already performing for a substantial part of the work day and were being performed by some of her more senior coworkers—was clearly nothing more than a task reassignment unaccompanied by any change in salary, work

hours, or job category. The Sixth Circuit's reasoning also reflects precisely the same undue regard for individual subjective perceptions rejected by other circuits. Indeed, it is far from self-evident that a dirtier and more physically demanding task is inferior to a cleaner and less tasking one. *See Ramirez v. City of San Antonio*, 312 F.3d 178, 180 (5th Cir. 2002) (employer allegedly discriminated "by transferring [the plaintiff] to a less-physically demanding position"). The bottom line, as the original Sixth Circuit panel observed, is that:

> The railroad hired White as a track maintenance worker. One of her explicit job responsibilities was to maintain the railroad tracks. We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her.

Pet. App. at 96a. Directing an employee to do her job cannot be actionable retaliation, even if that employee has become accustomed to performing tasks that she views as more desirable and to leaving the more onerous tasks to her coworkers. That common-sense insight would have prevailed, under various tests, if this case had been litigated in at least four other circuits.

The Sixth Circuit's decision demonstrates the significant conflicts and confusion among the federal courts, and the pressing need for this Court's review. There is no reason to believe that this conflict will resolve itself without this Court's intervention. The circuits are now entrenched in their respective positions, and the EEOC, for its part, advances an expansive standard that all circuits but the Ninth have declined to adopt. *See, e.g.*, Pet. App. at 18a (rejecting the EEOC's proposed test); *Von Gunten*, 243 F.3d at 863 n.1 (same). The lower courts will remain in disarray, and employers will be left without clear and uniform guidance on the requirements of federal law, until this Court grants review of the issues presented here.

B. The Sixth Circuit's Decision Further Conflicts With The Decisions Of Three Other Circuits That An Employer May Cure Otherwise-Adverse Employment Actions

The Sixth Circuit also added to the confusion in the lower courts by holding that a temporary suspension of an employee that is subsequently vacated (with backpay and no interruption in benefits) through the ordinary operation of the employer's internal processes is nevertheless an adverse employment action. As a threshold matter, this holding clearly conflicts with the decisions of the Fifth and Eighth Circuits, which have held that interim decisions subsequently corrected by the employer are not "ultimate employment decisions" and therefore do not constitute adverse employment actions. *See, e.g., Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998) ("We need not address whether a mere delay in promotion constitutes an adverse employment action because Benningfield received the promotion with retroactive pay and seniority."); *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 880–81 (8th Cir. 2005) (no adverse employment action because the plaintiff failed to pursue internal review process, and initial decision to deny tenure was never finalized).

The Ninth, Eleventh, and D.C. Circuits also have held that "[a]n employer may cure an adverse employment action . . . before that action is the subject of litigation." *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) ("Brooks refused to accept the review and appealed, but she abandoned her job while the appeal was pending. Because the evaluation could well have been changed on appeal, it was not sufficiently final to constitute an adverse employment action."); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) ("[T]he decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, is not an adverse employment action. But when an employee loses pay or an

employment benefit from a delayed promotion, courts have held that the employment action is not adverse only when the action is rescinded and backpay is awarded.") (citations omitted); *cf. Brown*, 199 F.3d at 458 (low evaluation not an adverse employment action because "such evaluations could be adjusted on appeal before a separate administrative branch," and "[a]lthough Brown clearly knew of this procedure, there is no evidence that she ever sought such an adjustment").

Thus, the D.C. Circuit held in *Taylor* that there was no adverse employment action resulting from an allegedly retaliatory performance rating the employee received, even though it had the effect of lowering the amount of the employee's bonus, because the employee's supervisor "corrected the evaluation and paid the proper bonus before [the employee] brought this suit." 350 F.3d at 1289–90, 1293–94. The plaintiff could not maintain her retaliation claim, the court held, because "there was no unremedied adverse employment action when the suit was filed." *Id.* at 1294. A contrary decision, the D.C. Circuit added, would frustrate an important goal of Title VII:

> Permitting employers the opportunity to correct workplace wrongs prior to litigation is the objective of the EEO process. If a plaintiff were permitted a right to sue even if his or her employer had corrected the grievance, there would be absolutely no incentive for employers to make adjustments for past conduct during the EEO process.

Id. (quotation omitted); *see also Brooks*, 229 F.3d at 930 ("'To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.'") (quoting *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 546 (6th Cir. 1999)).

These decisions are in harmony with this Court's recognition in *Ellerth* that the use of an employer's "internal processes" plays a critical role in determining an employer's

Title VII liability, for it determines when a supervisor's allegedly discriminatory conduct becomes "an official act of the enterprise, a company act," and therefore an adverse employment action. 524 U.S. at 762. Consistent with Congress's intention that Title VII "encourage . . . effective grievance mechanisms" and "promote conciliation rather than litigation," intermediate acts that are not the final, "official act" of the employer are insufficient to support vicarious liability. *Id.* at 764. Such preliminary, tentative decisions should not constitute actionable retaliation either, for the same reasons.

In this case, it is clear that the employee's suspension was not the final, "official act" of the employer. Instead, it merely began an internal process that ultimately required the employer to render a final decision about the employee. That decision was to vacate the employee's suspension and award backpay for time away from work. In the end, the employer's process worked exactly as Congress hoped, and Respondent suffered no adverse employment action at all.

The Sixth Circuit relies on a prior decision of this Court holding that the pendency of an internal grievance process did not toll the statute of limitations on a Title VII claim, but that case does not remotely resolve this question. *See* Pet. App. at 23a (citing *Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976)). First, this Court did not hold in *Robbins* that internal grievance procedures are irrelevant as a matter of law to determining when an adverse employment action occurs. (Indeed, because that case involved a termination, this Court had no occasion to decide how the pendency of a grievance proceeding affects preliminary decisions that fall short of actual termination.) Instead, this Court noted that the relevant statutory "occurrence" depends on the circumstances, including the parties' expectations and any contractual agreements that fix the occurrence of the triggering event. *See* 429 U.S. at 234–35; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002) (characterizing *Robbins* as concluding that the

discriminatory conduct occurred on "the date that the parties understood the termination to be final"). In that case, because there was "no indication that either party viewed the . . . discharge as anything other than 'final,'" this Court found no reason to adopt a later event as the relevant occurrence. 429 U.S. at 235.[2]

Second, the circumstances surrounding suspensions are fundamentally different from those surrounding terminations. *Cf. Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (recognizing the qualitative differences between terminations and suspensions without pay for purposes of a due process analysis and observing, "Unlike the employee . . . who faced *termination*, respondent faced only a *temporary suspension* without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all"). Administrative suspensions, unlike terminations, are by their nature temporary and merely allow employers to conduct investigations without further exposure to the alleged misconduct.

Third, this Court in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), specifically took into account a university's process for reviewing and approving tenure recommendations in determining when the statute of limitations began to run. In that case, this Court affirmed the district court's determination that the limitations period did not begin to run until more than a year after the initial tenure recommendation had elapsed. *Id.* at 261–62. Under the Sixth Circuit's rationale, however, the limitations period in that case would have started running much earlier, for even a preliminary recommendation against tenure would

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[2] The Sixth Circuit's reliance on *Robbins* is particularly inappropriate in light of this Court's observation in that case that the issue of when the relevant conduct occurred was "raised by petitioners for the first time before this Court." 429 U.S. at 235 & n.7.

have constituted an adverse employment action. *See* Pet. App. at 21a n.7.

This Court has never held that decisions falling short of actual termination, demotion, or failure to promote are initially sufficient to trigger the relevant statute of limitations because those decisions are adverse employment actions as a matter of law.[3] Even if it had, that would not necessarily establish that a suspension that is later vacated, with full reinstatement and backpay, by the employer should *remain* a proper predicate for a subsequent retaliation claim. The Sixth Circuit's holding conflicts with the settled law of several other circuits.

II. THE CURRENT CONFLICT IN THE CIRCUITS CREATES SERIOUS DIFFICULTIES FOR ALL LARGE EMPLOYERS, AND FOR RAILROADS IN PARTICULAR

A. Employers Need A Clear And Uniform Nationwide Standard

This Court recognized in *Ellerth* that "a uniform and predictable standard must be established as a matter of federal law" where the federal courts are called upon to give meaning to Title VII's provisions. 524 U.S. at 754–55 (establishing agency principles applicable to all Title VII sexual harassment claims). As this Court has noted in other related contexts, a "clear and particularized policy—one which 'effectively communicates'" the applicable standard—is necessary to protect employers from "the imposition of massive and unanticipated" liability. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (upholding regulations exempting petitioners from overtime pay requirements of the Fair Labor Standards Act). Indeed, employees also benefit from the establishment of clear employment law standards

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[3] The Sixth Circuit's assertion that the "ultimate employment decision" test contravenes Title VII's goals of "'mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination,'" Pet. App. at 22a–23a (citation omitted), simply assumes the question to be decided: What constitutes "unlawful employment discrimination"?

because the existence of these standards "create[s] and fulfill[s] employee expectations of fair, uniform treatment." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002).

The standard for determining what kinds of employer decisions are serious and final enough to support a federal retaliation lawsuit is critically important to employers when deciding how much authority line supervisors in the field can be permitted to exercise over any employee who has ever made a discrimination complaint. If that threshold is set too low, then companies will have a strong incentive to require that any changes or disciplinary actions be approved by management or entrusted to a formal disciplinary process in the first instance. That incentive is heightened if, as the Sixth Circuit held, a later reversal of the decision by management will not eliminate the risk of a Title VII lawsuit. A clear and uniform nationwide resolution of the questions presented by this case is therefore critically important to large employers, which frequently have operations stretching across multiple jurisdictions and federal circuits.

That is, of course, particularly true of railroads. BNSF's rail operations, for instance, stretch across the western two-thirds of the United States. In its Northwest #100 seniority district, which includes five states in the Ninth Circuit, the current governing law would discourage vesting any meaningful discretion in its line supervisors over any employee who has ever made a complaint about discrimination.[4] In BNSF's Fargo #300 seniority district in the Eighth Circuit, however, the company could confidently vest significant day-to-day discretion in its supervisory personnel, for only if a decision amounts to an "ultimate employment decision" would it trigger potential Title VII liability for retaliation. *Ledergerber*, 122 F.3d at 1144. The

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[4] A "seniority district" is generally the relevant employee subdivision for railroads. It is defined by the geographical reach of the various collective bargaining agreements to which the rail company is a party.

legal landscape for BNSF is even more complicated for seniority districts that reach across multiple circuits. Its Lincoln #400, Kansas #700, and Texas #800 seniority districts, for example, include states in the "intermediate" Tenth Circuit (where "the employer's conduct must be 'materially adverse' to the employee's job status" to support a retaliation claim, *Medina*, 413 F.3d at 1136), *and* states in the strict Fifth or Eighth Circuits. Indeed, this case demonstrates the disparate standards that may apply even to the same operational unit. This case presumably fell within the jurisdiction of the Sixth Circuit because Respondent was primarily assigned to the Maintenance of Way department at BNSF's Tennessee Yard. The incident giving rise to Respondent's temporary suspension for subordination, however, occurred while Respondent was supporting a regional tie gang in Blytheville, Arkansas, within the jurisdiction of the Eighth Circuit.

Obviously petitioner BNSF and AAR's other member-railroads cannot structure their employment policies to account for all of these inconsistencies. The practical effect of the confusion among the circuits, especially in light of an employer's potential liability for punitive damages, is that many interstate employers will be forced to adopt uniform nationwide policies that are driven by the particularly unfavorable law of the Ninth and Sixth Circuits—and that therefore place an excessive premium on avoiding litigation as opposed to effective and immediate supervision of employees. A clear and uniform determination from this Court is essential so that national employment policy is not effectively set by outlying decisions in two of the federal courts of appeals.

B. The Sixth Circuit's Holdings Discourage Adoption Of Employment Policies Most Consistent With The Safe And Efficient Operation Of The Nation's Railroads

AAR respectfully submits that this Court, in setting a uniform nationwide rule, should reject the two holdings of the Sixth Circuit in this case and adopt the "ultimate

employment decision" standard articulated by the Fifth and Eighth Circuits. The Sixth Circuit's threshold for what constitutes an actionably adverse change in the terms and conditions of employment is far too low, and its holding that allegedly retaliatory decisions cannot be "cured" by senior management after the fact (even if full backpay is paid) irrationally discourages companies from adopting vigorous internal review mechanisms. Those holdings have far reaching, adverse implications for the structuring of employment relationships in general, and on the management of the Nation's railroads in particular.

By according extraordinary weight to the subjective perceptions of employees regarding the desirability of particular tasks they are assigned to perform, the Sixth Circuit's decision promises to inundate the courts with litigation over trivial disputes and otherwise ordinary workplace interactions that should not be the subject of federal civil rights actions. This will enmesh employers in lengthy and costly litigation, in which they will often be unable to obtain judgments as a matter of law prior to trial because the lawsuits will inevitably turn on factual disputes about the supervisor's motive. Plaintiffs can easily allege, and juries can easily conclude, that a discriminatory intent motivated some resented request by a supervisor whenever the employee had previously made a complaint about alleged discrimination. The Sixth Circuit's decision imposes unwarranted litigation burdens on companies for "trivial personnel action that an irritable, chip-on-the-shoulder employee did not like." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

Indeed, the Sixth Circuit's standard, and the even less demanding test advocated by the Ninth Circuit and the EEOC, are hard to square with this Court's repeated holdings that sexual harassment does not alter the terms and conditions of employment unless it is sufficiently "severe" or "pervasive" to create an *objectively* "hostile working environment." *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). That standard was designed to

identify workplace conduct that, although perhaps offensive, is not serious enough to justify federal litigation. If relentless sexual innuendo cannot be actionable as discrimination unless it renders the overall environment severely or pervasively hostile, it is not clear why much less harmful conduct should be actionable when it is alleged to be retaliatory.

Perhaps more importantly, the Sixth Circuit and Ninth Circuit standards place employers in the untenable position of being unable to supervise employees who have arguably engaged in protected activity. Any perceived slight could be grounds for a retaliation suit, inevitably making employers cautious about the authority they entrust to supervisors, and making supervisors cautious about exercising whatever authority they retain. That caution will be exaggerated by the Sixth Circuit's other holding that retaliatory actions cannot be "cured" even when they are later completely reversed, with backpay, by the review of more senior management. Both of the Sixth Circuit's holdings in this case accordingly undermine an employer's ability to vest meaningful, immediate supervisory authority in its front-line supervisors, and hamper the ability of supervisors to respond to circumstances requiring immediate and decisive action.

Such excessive caution may be harmless in some industries, but it poses serious problems for the safe and efficient operation of the Nation's railroads. First, safety requires all rail employees, especially line supervisors, to act quickly and decisively to respond not only to clear emergencies, but also to situations that call for an exercise of judgment but may present a serious threat to the safety of the public and rail workers alike. A supervisor may, for example, be called to respond to circumstantial evidence of employee drug or alcohol abuse, and his or her decision may be based on nothing more than an assessment of an employee's appearance or demeanor. Or a supervisor may be required to draw a line between a difference in opinion and outright insubordination. In situations in which the

slightest error in judgment can ripple into a deadly accident, a supervisor must have the latitude to err on the side of safety. This is particularly true given the decentralization and wide dispersion of railroad operations. Railroads of necessity rely on their line supervisors to enforce the myriad safety and operational rules applicable to the nearly 140,000 miles of rail in the United States and tens of thousands of rail employees in the first instance. *Cf.* BNSF Maintenance of Way Operating Rules § 1.13 (eff. Oct. 31, 2004), *available at* http://www.bnsf.com/employees/safety/pdf/MWSafety2004.pdf ("Employees will report to and comply with instructions from supervisors who have the proper jurisdiction.").

The Sixth Circuit's decision adversely affects the ability of supervisors to exercise this critical discretion where the employee involved previously has engaged in activity arguably protected by Title VII. An employer reasonably may withhold from the supervisor the necessary authority to temporarily reassign or suspend *any* employee when the result of an error may be Title VII liability for compensatory as well as punitive damages for retaliation—or at least involvement in costly and time-consuming litigation. Yet in these circumstances only a swift reassignment or suspension may avert a real threat to safety.

It is no answer to suggest (as did the Sixth Circuit, at Pet. App. at 24a) that employers should simply suspend employees with pay. As an initial matter, it is far from clear that such action would not be found to constitute an adverse employment action under the Sixth Circuit's rationale. And as the petition discusses, this approach imposes an unfair and substantial economic burden on employers, who would have to continue paying every suspended employee (as well as the other employees filling in for them) but would not have the practical ability to recover the money where, as in

most cases, the suspension is upheld and the employee is eventually terminated. *See* Pet. at 20.[5]

Second, prior management review of the reassignment of individual employees to different tasks within their understood job responsibilities simply is not practical in the railroad context. The tasks of rail employees engaged in operations and maintenance are of necessity not static; the location, difficulty, physical demands, required technical skill, and other aspects of the individual tasks they may be expected to perform vary, depending on operational needs and the workforce management decisions of supervisors, on a day-to-day basis. Maintenance-of-way crews, for instance, may operate rail test cars, perform necessary defective rail changes, correct track geometry defects, or make emergency repairs caused by derailments or adverse weather conditions on any given day. *See Practical Guide To Railway Engineering* 36 (Am. Ry. Eng'g & Maint. Of Way Ass'n ed., 2d ed. 2003). Each of these jobs in turn may require individual members of the crew to perform a wide variety of different tasks, and railroads hire these employees to do just that.

The Sixth Circuit's overly rigid view of what constitutes a "reassignment," and the court's undue deference to the subjective desires of an employee to perform some, but not all, of the tasks associated with her job, intrude upon the fundamental prerogative of supervisors to assign (and reassign) employees to meet operational needs. Under the Sixth Circuit's view, employees simply could file discrimination charges and be able to decline to perform duties that they subjectively dislike but that would

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[5] *Cf. Homar*, 520 U.S. at 932 (rejecting due process challenge of state employee who was suspended without pay following his arrest on felony drug charges and noting, "We think . . . that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him").

otherwise be part of the universe of tasks the employer hired them to carry out. The Sixth Circuit's decision thus creates an incentive for employees to file discrimination charges in an effort to entrench themselves in choice positions or "cherry pick" the tasks they like best, and hinders the ability of employers to manage their workforce efficiently. This Court has admonished that Title VII was "not intended to diminish traditional management prerogatives," *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quotation omitted), and that no employee should be able to place himself "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977).

The Sixth Circuit's parallel holding that a temporary suspension or reassignment cannot be cured by management's subsequent decision to reinstate the employee (with full backpay) exaggerates these perverse incentives and discourages internal efforts to identify and redress statutory violations without litigation. The Sixth Circuit correctly noted that an employee who is wrongly suspended and subsequently reinstated, with backpay, may nonetheless have suffered some inconvenience and expense. But that is a small price to pay for a rule that encourages employers to seek out and confess error, and saves all parties and the federal courts the burden of litigation. Indeed, the Sixth Circuit's holding perversely punishes employers for maintaining honest and rigorous internal grievance and review procedures, because a full reinstatement with backpay will no doubt be interpreted by a subsequent jury as a concession that the initial suspension was unjustified—and hence presumptively discriminatory or retaliatory. At a minimum, plaintiffs can be expected to make that argument. As this Court recognized in *Ellerth* and its companion case, *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–07 (1998), the broad language of Title VII deliberately entrusts this Court with discretion to fashion

sensible rules that "promote conciliation rather than litigation," *Ellerth*, 524 U.S. at 764, and encourage employers to pursue prophylactic measures that minimize the need for federal intervention. No sensible policy is furthered by punishing an employer for acknowledging that, despite a supervisor's initial judgment that a suspension or reassignment was warranted at the time, that judgment was an overreaction and the employee should be fully reinstated. The Sixth Circuit's decision constitutes an unwarranted extension of Title VII and an impermissible intrusion into the employment relationship that, in the rail context, could threaten public safety.[6]

CONCLUSION

For the foregoing reasons, the Association of American Railroads respectfully urges this Court to grant the petition for certiorari and reverse the decision of the Sixth Circuit.

Respectfully submitted,

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[6] While AAR in this brief has focused on the retaliation issue, it also strongly supports certiorari on the second question presented for review—whether a stand-alone retrial on punitive damages under a preponderance-of-the-evidence standard is appropriate in these circumstances—for the reasons stated in the petition.

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IN THE

Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief supports the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 320 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members are all employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and other laws against employment discrimination and retaliation. As business enterprises in a competitive economy, they have important obligations to maintain productivity, efficiency and discipline in their workplace operations. EEAC's members, therefore, have a significant interest in the issues raised by the Petition for Writ of Certiorari, which put in question whether an employer can be found to have retaliated against an employee in violation of Title VII simply by changing the employee's assigned job tasks in a way that does not result in any change of job classification, pay or status, or by temporarily suspending the

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

employee from service pending an internal investigation, after which the employee is restored to active service with no loss of pay or other adverse consequence, as well as the appropriate burden of proof on a claim for punitive damages under Title VII.

The court below answered the first two of these questions in the affirmative, essentially dispensing with the requirement that a Title VII retaliation plaintiff show a materially adverse employment action by the employer. In the lower court's broad view, unlawful retaliation can take the form of virtually "*any kind* of adverse action." Pet. App. at 22a. The court also erroneously ruled that the standard of proof for an award of punitive damages is a mere "preponderance of the evidence." *Id.* at 28a-34a.

These issues are extremely important to the nationwide employer constituency that EEAC represents, and EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the concerns of the business community and the significance of this case to employers. EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

When Burlington Northern & Santa Fe Railway Co. (BNSF) hired Sheila White in June of 1997 as a track laborer, she initially was given the responsibility of operating a forklift, along with other track laborer duties. Pet. App. at 3a. In September of that same year, White complained to management that her foreman treated her differently from male employees and had made two inappropriate remarks. Pet.

App. at 4a. The company conducted an immediate investigation and then suspended the foreman without pay for ten days and ordered him to attend sexual harassment training. *Id.*

During the investigation, BNSF heard complaints from other more senior employees that White was receiving preferential treatment. *Id.* More specifically, complaints centered on the fact that White was allowed to spend the majority of her workday operating the forklift, while track laborers with greater seniority were required to work exclusively on tracks. *Id.* The employees who voiced these complaints apparently viewed forklift work as less difficult, and therefore more desirable, than track work. *Id.* In response to these complaints, BNSF gave the task of operating the forklift back to a more senior track laborer who had performed the function before White was hired. *Id.*

Approximately six months later, White apparently refused a direction from another foreman, and he suspended her for alleged insubordination, pending an investigation. *Id.* at 6a. After senior management concluded that the foreman had overreacted, BNSF reinstated White to her former position with full back pay and benefits. *Id.* at 7a.

White sued BNSF for sexual harassment and retaliation under Title VII. *Id.* The jury found in favor of BNSF on the sexual harassment claim, but found in White's favor on her retaliation claims. *Id.* BNSF moved for judgment as a matter of law or, in the alternative, for a new trial, contending that White had failed to establish retaliation under Title VII. *Id.* The district court denied the motion, and BNSF appealed that ruling to the Sixth Circuit. *Id.*

A panel of the Sixth Circuit reversed, finding that a minor adjustment in work assignments and a temporary suspension with full back pay and benefits did not constitute "adverse employment actions" and, therefore, were not actionable under Title VII. Pet. App. at 97a. White asked the full court

to rehear her claim, and the court agreed to do so. *Id.* at 123a. The decision of the *en banc* court initially stated that the proper standard for determining what is an actionable adverse employment action is whether the employer's action resulted in a "materially adverse change in the terms and conditions of [the person's] employment." Pet. App. at 10a. (citation and footnote omitted). The court went on to conclude, however, that discrimination can be "*any kind* of adverse action." *Id.* at 22a. (citation omitted). Applying this standard, the court went on to rule that a temporary suspension, even one that ultimately results in the employee's reinstatement with full back pay, as was the case here, constitutes a materially adverse change in employment. *Id.* at 22a-23a. The court also concluded that a simple change in an employee's job duties constitutes a materially adverse change in employment, even if the new duties the employee is expected to perform are within the scope of his or her job classification. *Id.* at 25a. Finally, the *en banc* court ruled that the proper standard for submitting punitive damages to the jury was a "preponderance of the evidence" standard, rather than the more exacting "clear and convincing" burden of proof. *Id.* at 32a-33a.

BNSF filed the instant Petition for a Writ of Certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

There is a sharp division among the circuit courts of appeals as to whether a claim of retaliation is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, if the plaintiff did not experience a materially adverse change in his or her terms or conditions of employment as a result. The Sixth Circuit below, while paying lip service to the "materially adverse" requirement, nevertheless adopted a standard, inconsistent with several other circuits, essentially allowing a claim to go forward if it

involves "any kind of adverse action." Pet. App. at 22a. This Court's review is necessary to resolve the discord.

Moreover, a standard that makes actionable *any* adverse action infringes substantially on an employer's ability to run its business. Title VII was not intended to "'diminish traditional management prerogatives.'" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). Few actions are more central to traditional management prerogatives than assigning specific job tasks to be performed by employees and maintaining order and discipline in the workplace. Yet the decision of the Sixth Circuit below severely diminishes management's prerogatives in both of these critical areas.

Under the court's ruling, once an employee has complained of discrimination, virtually every subsequent change in that employee's assigned job duties becomes a potential basis for a retaliation claim under Title VII, even if all tasks assigned to the employee are within his or her existing job description and the employee suffers no reduction in pay or loss of status. By literally making a potential "federal case" of virtually every routine change in work assignments, this interpretation of Title VII effectively would empower employees to pick and choose which of their assigned job functions they will perform, backing up their rejection of other assignments with threats of costly, time-consuming retaliation suits.

The decision below also would pose a dilemma for employers attempting to maintain workplace discipline. Employers are obligated to prevent sexual harassment, violence, illegal drug use and other serious workplace offenses. They also have a business responsibility to maintain order in the workplace. Customarily, the first step most employers take when an employee is suspected or accused of serious job misconduct, including insubordination, is to place the employee on suspension or administrative leave pending an

inquiry. If the inquiry confirms the employee's offense, the employer takes appropriate disciplinary action; otherwise, the employer returns the employee to active service, usually without penalty or loss of pay. Under the Sixth Circuit's ruling, however, employers would risk liability for retaliation any time they took this traditional approach in dealing with allegations of misconduct by an employee who previously had complained of discrimination. Thus, employers would be forced to make a Hobson's choice between allowing potentially dangerous or disruptive individuals to remain in the workplace, or suspending them pending investigation and thereby risking liability for retaliation.

Title VII's antiretaliation section should not be interpreted so as to impinge so severely on management's traditional prerogatives to assign work and administer discipline. Instead, that section is aimed solely at retaliatory actions that are materially adverse to the employee. Yet, the federal courts of appeals are presently divided over this very issue, with two other appeals courts having taken the same broad approach as the court below to conclude that virtually any unpleasant action can constitute unlawful retaliation. While several others properly limit recovery for Title VII retaliation to actions materially adverse to the employee, a decision by this Court is needed to resolve this disagreement and restore the legal certainty employers need in order to craft uniform workplace rules.

Moreover, for all of the reasons set forth in the Petition, as well as because of the unique nature of employment disputes, the court below erroneously concluded that punitive damages may be awarded to a Title VII plaintiff on a mere "preponderance of the evidence." Congress reserved punitive damages for cases involving an extraordinary degree of culpability on the part of an employer. For that reason, the "clear and convincing evidence" standard most appropriately applies. Anything short of this standard would only serve to under-

mine Title VII's carefully constructed remedial scheme and frustrate the important statutory goals of "conciliation, conference and persuasion."

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO ADDRESS A SHARP DIVISION AMONG THE CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHETHER TITLE VII'S ANTIRETALIATION SECTION IS VIOLATED WHERE THE PLAINTIFF SUFFERS NO "MATERIALLY ADVERSE" CHANGE IN TERMS OR CONDITIONS OF EMPLOYMENT

A. The Circuit Courts Are Divided On Whether A Materially Adverse Employment Action Is An Essential Element Of Unlawful Retaliation Under Title VII

Section 704(a) of the 1964 Civil Rights Act, commonly known as Title VII's "antiretaliation" section, makes it unlawful for an employer to discriminate against an employee because the employee has opposed a practice prohibited by Title VII or filed a charge with the Equal Employment Opportunity Commission (EEOC), given testimony, or otherwise participated in a proceeding under that statute. 42 U.S.C. § 2000e-3(a). To establish unlawful retaliation under Section 704(a), as the court below stated, a plaintiff must show: (1) that she engaged in an activity protected by Title VII; (2) that the employer took an employment action adverse to the plaintiff; and (3) that there was a causal connection between the protected activity and the adverse employment action. Pet. App. at 11a.

The dispute in this case centers on the second element in this formulation—*i.e.*, the requirement that a plaintiff show an "adverse" employment action by the employer. As the

Petition indicates, the federal courts of appeals are deeply divided over the appropriate standard for determining when an employer has unlawfully retaliated against an employee for the purposes of Title VII. Pet. at 10-17. The majority of courts have taken the sensible position that a person claiming retaliation must show some action that resulted in a "materially adverse change" in the terms and conditions of the person's employment. Most courts recognize that "materially adverse change" should parallel the requirement of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that a plaintiff show a "tangible employment action." The two courts that are the most consistent with *Ellerth* and *Faragher* have said that only adverse treatment with regard to some "ultimate employment decision"—such as hiring, granting leave, discharging, promoting, and compensating—can support a retaliation claim. *Brazoria County, Tex. v. EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). Under this view, actions such as warnings, negative performance appraisals, and lateral reassignments generally cannot be used as the basis for retaliation claims.

Although the court below purported to apply the "materially adverse" standard, in reality it did not. Initially the court said that it rejected the position taken by Respondent that *any* adverse treatment based on a retaliatory motive is unlawful. Later in the opinion, however, the court did a complete about-face, ruling that "the words 'discriminate against' literally mean '*any kind* of adverse action.'" Pet. App. at 22a. Then, demonstrating just how broad it intended the standard to be, the court concluded that an employer commits unlawful retaliation by simply asking an employee to perform the job for which she was hired and by placing her on a temporary suspension pending an investigation into possible miscon-

duct, even though the suspension was later rescinded and the employee fully compensated for time she was not at work.

Other courts have taken broader views, ruling that almost any unpleasant action by an employer (whether material to the terms or conditions of the person's employment or not) can be the basis for a retaliation claim if it is based on a retaliatory motive. The Court of Appeals for the Ninth Circuit has said, for example, that "an adverse employment action" in a retaliation case can be almost any employment action by an employer if it is based on a retaliatory motive and is "reasonably likely to deter" an employee from engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (quoting EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998)). *See also Washington v. Illinois Dep't of Revenue*, No. 03-3818, 2005 U.S. App. LEXIS 17977 (7th Cir. Aug. 22, 2005) (holding that even actions outside the workplace can be the basis of a retaliation claim).

The Sixth Circuit has rejected the Fifth, Eighth, and Ninth Circuit tests, but it so diluted the "materially adverse" standard as to allow anything to satisfy it, in further conflict with other courts that have adopted the same nominal standard. The wide disparity between the views of the courts of appeals on this issue merits this Court's review.

B. The Requirement That A Retaliation Claimant Be Able To Show A Materially Adverse Employment Action Is Fully Consistent With Supreme Court Decisions Interpreting Title VII

This Court went to significant lengths in its *Ellerth* and *Faragher* decisions to make clear that its concept of "tangible employment actions" is limited to actions that have material, adverse effects on employees' terms or conditions of employment. In the Court's words:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing,

> failing to promote, reassignment *with significantly different responsibilities*, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761 (emphasis added). Indeed, the Court explicitly stated that "[a] tangible employment action in most cases inflicts direct economic harm." *Id.* at 762. To conclude that the Court intended this term to include inconsequential changes in job assignments of the sort involved in this case, as the court below has done, is a distortion of the Court's decisions.

Similarly, while the Court also recognized in *Ellerth* and *Faragher* that actions other than "tangible employment actions" can constitute unlawful discrimination under the "hostile environment" theory, it made clear in those decisions, as it has in the past, that to rise to the level of actionable discrimination under Title VII, the actions in question must be so "severe or pervasive" as to have "altered terms or conditions of employment." *Ellerth*, 524 U.S. at 752 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)). Again, these references reflect the Court's recognition that Title VII does not address petty or routine workplace irritations or disappointments, but only actions sufficiently serious to adversely affect an employee's employment in a material way.

C. Unless A Materially Adverse Employment Action Is Required To Establish Unlawful Retaliation Under Title VII, Virtually Every Employer Action And Reaction Following A Complaint Alleging Discrimination Will Require Litigation

The rule that a plaintiff must show a materially adverse employment action to establish unlawful retaliation under Title VII distinguishes actual discrimination from mere unpleasantness and disappointment of the sort employees often

experience in relations with their supervisors and managers. "Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." *Marerro v. Goya of P.R., Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)).

Every employee has the right to file charges with the EEOC and to oppose conduct he or she reasonably believes is unlawful under Title VII.[2] And every employee who has exercised these rights has the potential to become a retaliation plaintiff. EEOC statistics show that retaliation charges are now the fastest-growing category of charges filed under Title VII, having roughly doubled over the past decade.[3] If the courts do not keep the standard for establishing retaliatory conduct at a level that materially affects the employment relationship, these numbers can be expected to increase even more dramatically, with resulting effects on caseloads not only of the EEOC, but also of the federal courts themselves.

Section 704(a) is designed to assure that employees who exercise their Title VII rights do not suffer discrimination in employment as a result. It is not, however, designed to vaccinate such employees against legitimate discipline or supervi-

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[2] Several courts have ruled that an employee's opposition to a practice the employee reasonably regards as a Title VII violation is protected under Section 704(a), even if the employee's belief is mistaken. *E.g.*, *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

[3] The statistics reported on EEOC's website show that Title VII charges alleging retaliation increased from 10,499 in Fiscal Year 1992 to 20,240 in Fiscal Year 2004 and, during that same period, grew from 14.5 percent to 25.5 percent of all Title VII charges filed with the agency. EEOC Charge Statistics, FY 1992 Through FY 2004, *available at* http://www.eeoc.gov/stats/charges.html.

sory control. "Engaging in protected activities or protected conduct should not put the plaintiff in a better position than she would be in otherwise." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (citation omitted).

Employees who have accused their employers of discrimination are likely to view every subsequent action and reaction by their employers through a prism of suspicion and distrust. Given the costs of litigation, if every reassignment of tasks within their job classification could serve as a viable basis for a retaliation suit, such employees would have an effective veto power over routine work assignments and supervisory directives they did not happen to like. Such an interpretation of Title VII would be at odds with the fundamental purpose of the statute, which was not intended to "diminish traditional management prerogatives." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). The requirement that a retaliation claimant be able to show a materially adverse employment action prevents this unintended result, while assuring that employees' rights are protected.

D. Neither A Reassignment To Different Tasks Within The Same Job Classification Nor A Temporary Suspension Pending An Internal Investigation Amounts To Discrimination Under Title VII

In this case, White claims that BNSF discriminated against her by relieving one job duty—operating a forklift—so that she could perform other track maintenance work. Yet it is undisputed that both track maintenance and forklift work fell within the designated duties of her job classification ("track laborer"), that track maintenance responsibilities had always been part of White's job, and that the reassignment resulted in no change in her classification, rate of pay or benefits. Pet. App. at 95a.

Assignment of tasks and responsibilities to individual employees has long been recognized in labor law as a fundamental prerogative of management. *See generally* ABA Section of Lab. & Empl. Law, *Elkouri & Elkouri: How Arbitration Works*, 697-705 (Alan Miles Ruben ed., BNA 6th ed. 2003), and authorities therein cited. Reassigning an employee to different duties within his or her existing job classification, without significantly changing pay or benefits, is not regarded as a sufficiently "material, substantial, and significant change" in terms or conditions of employment to require collective bargaining under the National Labor Relations Act. *E.g.*, *Alamo Cement Co.*, 277 N.L.R.B. 1031 (1985) (footnote omitted); *see generally* 1 ABA Section of Lab. & Empl. Law, *The Developing Labor Law* 1220-23 (BNA 4th ed. 2000 & Supp. 2004). Thus, an employer's mere, routine exercise of the authority to assign or reassign job tasks to employees does not, without more, amount to a change in their employment status, compensation, terms, conditions, or privileges of employment, and therefore cannot constitute actionable discrimination under Title VII.

White also claims that BNSF discriminated against her by suspending her pending an internal inquiry into a supervisor's determination that she had been insubordinate. Yet it is undisputed that the suspension was only temporary, that White was returned to active service upon completion of the inquiry, and that she ultimately suffered no loss of pay or benefits or other employment-related detriment. Thus, again, no material adverse action had occurred.

Employers regularly conduct internal workplace investigations. Indeed, they are under ever-increasing legal obligations to do so. The Supreme Court's sexual harassment holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), delineate employers' responsibilities under Title VII to investigate all employee complaints of sexual harassment

promptly and take appropriate steps to correct such harassment when they find it. Subsequent court decisions have extended these obligations to allegations of racial harassment and other discriminatory practices, as well. *See, e.g., Hill v. American Gen. Fin., Inc.*, 218 F.3d 639 (7th Cir. 2000) (racial harassment); *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000) (racial harassment and retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998) (same). Employers also are obligated to conduct workplace investigations under the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1), the Drug-Free Workplace Act, 41 U.S.C. §§ 701-07, the Securities and Exchange Act, 15 U.S.C. §§ 78o(b)(4)(E) and 78o(f), and numerous other laws.

Where allegations of serious employee misconduct are at issue, a customary first step in conducting such internal investigations is to place the accused employee on suspension or administrative leave pending the outcome of the inquiry, just as BNSF did with the foreman whom White claimed sexually harassed her. This gives the employer time to ascertain the facts and decide on an appropriate response, without risking the disruption or additional misconduct that could occur if the accused were allowed to remain in the workplace in the interim. In many instances, this preliminary step is necessary to prevent interference with the investigation itself. In some cases, too, it is necessary to remove an accused wrongdoer from the premises after the employer has been placed on notice of his or her alleged misconduct because failure to do so could expose the employer to liability for negligence, or worse, if the same individual were to commit subsequent actions that caused injury to coworkers, customers or others. The temporary suspension procedure thus protects important interests of the employer and others during the pendency of the investigation.

At the same time, the suspension procedure does not adversely affect the suspended employee, because if the inquiry results in a determination that the allegations of

misconduct were unfounded—or, as in this case, that a supervisor "overreacted"—the employer can rescind the suspension and restore the employee's pay for the interim period, as BNSF did here. Thus, the suspension is merely temporary, and ultimately results in no adverse employment action at all, material or otherwise. Quite the contrary, where the procedure is administered as it was in this case, its only net consequence is that the employee has received an extra period of time off with full pay—hardly an adverse employment action.

The court below specifically acknowledged EEAC's concern that employers maintain the prerogative to suspend employees who are suspected of wrongdoing pending an investigation, lest they be placed in the untenable position having to choose between keeping suspected wrongdoers in their workplace or facing potential Title VII liability. Apparently without much thought, however, the court dismissed this concern, suggesting employers may avoid liability simply by continuing to pay employees while they are on temporary suspension.

Unfortunately, this is not a workable solution. Where the employer discovers during the course of an investigation that a suspended employee has engaged in serious misconduct, many state wage payment laws would make it difficult—and in many cases impossible—for the employer to recover paychecks awarded the employee during the suspension. *See, e.g.*, Cal. Lab. Code § 450; Md. Code Ann., Lab. & Empl. § 3-503. Accordingly, an employee found to have engaged in serious misconduct would be *rewarded* with a paid vacation before his well-deserved termination. Such a practice sends the wrong message both to the wrongdoer and other employees, as well as undermines the credibility of the employer's disciplinary process. It also leaves the door open for unscrupulous employees to abuse the system in order to secure additional paid time-off for themselves, further eroding the employer's efforts to prevent future misconduct.

Moreover, a policy of paying employees temporarily suspended because of suspected misconduct is also costly. Even an *unpaid* temporary suspension imposes significant financial and operational costs on an employer. If also required to pay wrongdoers for work not performed, employers might simply abandon the practice altogether, even when the suspected misconduct is serious. The likely result will be greater exposure to liability for employers for negligence and an overall increase in employment litigation. Ultimately, interpreting Title VII so as to cause employers to abandon this common and very sound business practice will disadvantage both employers and workers. On the other hand, the employer's ability to maintain a safe, effective and orderly work environment is in no way compromised by a disciplinary process that suspends an employee without pay until such time as an internal investigation clears her of wrongdoing.

E. A Decision By This Court Is Needed To Resolve The Circuit Conflict And Restore Legal Certainty For Employers

EEAC's member companies conduct business in multiple states across the nation, and they seek to establish uniform, company-wide policies that are consistent with the federal nondiscrimination laws. This effort is undermined if there is inconsistency and instability in the federal employment laws that apply to employees located at different geographic locations. Simply put, employers cannot develop uniform disciplinary procedures for their workers across the country if they face retaliation claims challenging those procedures by employees who work at sites located in some circuits.

While the very common practice of temporarily suspending an employee pending an investigation into misconduct, as well as minor changes to an employee's day-to-day work

responsibilities, would be perfectly lawful under the "materially adverse change" standard, these same actions would be prohibited under the unmanageably broad approach of the Sixth and Ninth Circuits. A decision by this Court is needed to resolve this disagreement and restore the legal certainty employers need to ensure safe and efficient operations at workplaces around the country. For the reasons set forth in this brief, and in the petition, plaintiffs claiming unlawful retaliation must be required to show that their employer took some materially adverse employment action against them, beyond a mere change in assigned tasks within the same job classification or a temporary suspension during the pendency of an internal investigation.

II. "CLEAR AND CONVINCING EVIDENCE" IS THE APPROPRIATE EVIDENTIARY STANDARD FOR AN AWARD OF PUNITIVE DAMAGES IN A TITLE VII CASE

Also at issue in this case is the appropriate standard of proof for an award of punitive damages under Title VII. Although Congress unquestionably recognized all acts of intentional discrimination as reprehensible, the structure and wording of the 1991 amendments to Title VII make clear that it intended to reserve the remedy of punitive damages for cases involving an extraordinary degree of culpability on the part of an employer. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) (holding that "Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.") While those amendments may be silent as to the evidentiary standard that should be applied in a case where an award of punitive damages is sought, for all of the reasons set forth in the petition, punitive damages should be awarded only where the plaintiff has shown by *clear and convincing*

evidence that a defendant has acted "with malice or reckless indifference." 42 U.S.C. § 1981a(b)(1).

We need not reiterate in this *amicus* brief the petitioner's very thorough analysis to demonstrate the correctness of its conclusions. We merely highlight one additional observation, that any lesser burden of proof for an award of punitive damages is particularly inappropriate in employment cases because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case probably never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most labor and employment disputes involve individuals and companies with an ongoing relationship that began before the dissention and in many cases is expected to continue after the parties' differences are resolved.

For this reason, Title VII encourages conciliation and resolution rather than litigation:

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added) (citations omitted).

Accordingly, when Congress added compensatory and punitive damages to Title VII in 1991, 42 U.S.C. § 1981a, it tempered the potential effect by capping the amount at a combined total of $300,000 as discussed above. In addition, Congress specifically reiterated its commitment to enforcement of Title VII in ways other than litigation, stating that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." P.L. 102-166, § 118, codified as 42 U.S.C. § 1981 note.

Allowing punitive damages to be awarded on a mere "preponderance of the evidence" will make the award of such damages commonplace, circumventing the Congress' intent that punitive damages be awarded only in extraordinary cases and seriously hampering conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness before them to settle, have found even general damages awards to be a serious impediment to conciliation and settlement in employment litigation.

The potential negative effect that the unbridled availability of general damages can have on the conciliation process was best expressed by courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. 29 U.S.C. § 626(b). These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1039 n.8 (5th Cir. 1977). *See Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977) ("Haggling over an appropriate

sum could become a three-sided conflict among the employer, the [EEOC], and the claimant"); *Dean,* 559 F.2d at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act") (footnote omitted); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process"); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621, 622 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries"). As these judges observed, the hope of a "big ticket" damages award at trial is a major disincentive to conciliation.

Thus, lowering the standard of proof to a mere "preponderance of the evidence" undermines Title VII's carefully constructed remedial scheme. Rather than furthering the statutory goals of "conciliation, conference and persuasion," reports of punitive damages awards easily won by a plaintiff dangles the hope of a windfall jury verdict in front of those whose better interests would be served by a mutually agreed-upon settlement.

CONCLUSION

We respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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In The Supreme Court of the United States

BURLINGTON NORTHERN and SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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INTRODUCTION

This case does not present an appropriate vehicle for resolving the first question presented. Petitioner seeks a grant of certiorari to challenge the Sixth Circuit standard that retaliatory acts are unlawful under Title VII if those actions are "materially adverse" to the interests of the plaintiff. But in the courts below petitioner did not object to the jury instruction incorporating this very standard, and repeatedly filed briefs endorsing the materially-adverse standard.

This case is emphatically not an appropriate vehicle for deciding between the standards in the Sixth and Ninth Circuits. Petitioner clearly would lose under the Ninth Circuit standard, as it did under the Sixth Circuit standard. Petitioners have not demonstrated that the outcome of this dispute would be any different if this Court were to adopt the Fifth Circuit standard.

Petitioner overstates the extent of any inter-circuit conflict regarding what retaliatory actions are unlawful. There is no showing that the formulations used in the Sixth and Ninth Circuits differ significantly in practice. The *current* Eighth Circuit standard is that a retaliatory action is unlawful if it results in a "material employment disadvantage," which is impossible to distinguish from the Sixth Circuit materially-adverse standard. The Fifth Circuit's "ultimate employment decision" standard may lead in some cases to a result different from that under the standard in the other eleven circuits, but there is no showing that there is any conflict between the Fifth and Sixth Circuits regarding the correct outcome in *this* case.

Every federal circuit to address the issue has concluded that the appropriate standard of proof for punitive damages under Title VII is proof by a preponderance of the

evidence, as has the Colorado Supreme Court. Five federal courts of appeals have included that standard in their pattern jury instructions. The fact that some states have, by statute or caselaw, adopted a different standard for punitive damages under *state* law does not create any conflict regarding the correct interpretation of Title VII. Consideration of this issue in the instant case would be premature. No award of punitive damages has yet been made; the court of appeals remanded this issue to the district court, which must first decide whether a retrial regarding punitive damages should be held at all.

STATEMENT OF THE CASE

The events giving rise to this action concern employees who work in or operate out of the Tennessee Yard facility of the Burlington Northern Santa Fe Railroad ("BNSF"). In the spring of 1997, a change in the BNSF methods for distributing supplies created a need for a forklift operator at the Tennessee Yard. BNSF initially assigned that work to Ralph Ellis, who appears to have been the only worker then at the Yard who was qualified to operate a forklift. (III Tr. 542). Ellis, however, was classified as a member of the mobile track gang, a position which entitled him to a special per diem allotment of approximately $200 a week. (II Tr. 393; III Tr. 503, 518). When BNSF required Ellis to give up that per diem if he was to remain as the forklift operator, Ellis opted to return to the better paid mobile track gang. (III Tr. 503, 508; Pet. App. 3a).

Ellis' decision created the need for a new forklift operator. At about the same time, respondent White was among the applicants for work at BNSF. White had substantial prior experience as a forklift operator, and BNSF

officials during her interview expressed considerable interest in that qualification. (I Tr. 73-77, 81-82; III Tr. 503, 597; Pet. App. 3a). The BNSF interviewers advised White that they would "call [her] for the forklift operator because [she] had experience in that." (I Tr. 83). White was hired by BNSF in June 1997, and was immediately assigned to operate the forklift.

Because the forklift position was a new one, there was no such job classification under the applicable collective bargaining agreement. White was placed in the general classification "track laborer." But White's job was quite different from the work of the other employees in that classification. White spent most of her day operating the forklift; the rest of her time was devoted primarily to cleaning up in the tool building and distributing supplies. (I Tr. 86-88). When, several months later, White was reassigned to track laborer duties, White testified she "ha[d] never experienced working on the railroad tracks." (I Tr. 119).[1]

The work done by regular track laborers was far less desirable than White's duties. Track laborers repaired damaged tracks and performed a variety of dirty and physically demanding tasks. (I Tr. 127; II Tr. 407-08, 418; Pet. App. 4a, 107a). "[T]rack laborers must carry heavy objects (e.g., heavy, cumbersome jacks that weigh approximately 110 pounds.)" (Order Denying Defendant's

[1] The petition states that "in her role as track laborer, [White] spent a majority of her time working outside in the rail yard." (Pet. 4). The testimony in question, however, makes no mention of the rail yard, and does not purport to be a description of working as a track laborer. Rather, White was simply explaining that the use of the forklift to unload trucks occurred outside. "[I was u]nloading trucks, placing items in a bin where it needs to go, whatever needed done outside." (I Tr. 99).

Motion for Summary Judgment, p. 14). The track laborers themselves characterized the forklift job as more desirable, "easier," and a "soft" position. (II Tr. 406; III Tr. 534, 617). The track laborers, all of whom were men, and none of whom were qualified to operate a forklift, complained that a woman had gotten that job. (II Tr. 406, 432). Just as White did not perform (at least most of) the duties done by track laborers, none of the track laborers ever operated the forklift.

On September 16, 1997, White filed an internal complaint of sexual harassment and discrimination by her foreman, Bill Joiner. On September 26, 1997, BNSF suspended Joiner for ten days and ordered him to attend training regarding sexual harassment. On the same day, Marvin Brown, the supervisor who oversaw the work of both White and Joiner, transferred White from the position of forklift operator to regular track laborer. To fill the resulting forklift operator vacancy, Brown then transferred Ellis back from mobile track gang to the forklift position which he had opted to leave only a few months earlier, even though doing so meant that BNSF then paid Ellis the additional $200 weekly per diem that it had not paid to pay White. (III Tr. 536-37).

White contended that the reassignment to track laborer work was in retaliation for her sexual harassment complaint. BNSF officials gave a series of conflicting explanations for this adverse action. First, at the time when Brown told White of the reassignment, he explained that he had taken that action because he was going to either phase out the forklift operator work or put the position of forklift operator up for bid among all the employees. (I Tr. 141). Brown in fact did neither. (III Tr. 539). Second, in response to White's EEOC charge, Brown

gave the EEOC a sworn statement that he had removed White in response to a complaint from the union Chairman. (III Tr. 532). However, the union Chairman denied having made such a complaint (II Tr. 340-41; Pet. App. 5a); at trial Brown both asserted there had been such a complaint and admitted that there had not. (III Tr. 520, 524, 530-31). Third, in a response to a pre-trial interrogatory, BNSF stated that it had reassigned White because her position was claimed by a more senior employee. (III Tr. 530; Pet. App. 5a). But Ellis, who was assigned the job in White's place, denied he had asked for it (III Tr. 660; Pet. App. 5a), and Brown admitted that assignment to the forklift job was not governed by seniority at all. (III Tr. 523-24, 546-47, 641). Fourth, at trial Brown testified he had replaced White because he had received complaints from Ellis and a senior track laborer that White held the forklift job despite the fact that she was less senior than male workers. (III Tr. 520-21, 526; Pet. App. 5a). But Ellis insisted he had not complained (III Tr. 659), and none of the track laborers (whatever their seniority) were qualified to operate the forklift. (III Tr. 542; Pet. App. 5a). Unsurprisingly, the jury concluded that BNSF had engaged in unlawful retaliation.

On December 4, 1997, White filed a charge with the EEOC alleging that BNSF had discriminated against her because of her gender. A week later, Brown retaliated by directing that White be "remove[d] from service." (I Tr. 153; IV Tr. 747; Pet. App. 5a). There was conflicting testimony about the nature of this disciplinary order. The union Chairman testified that this meant that White was fired, albeit with a right to appeal. (II Tr. 337 ("dismissed"), 348 ("discharged"), 355 ("dismissed.")) If White had not appealed this order within 15 days, her employment by BNSF would have permanently ended. (Pet. App.

6a). BNSF officials, on the other hand, asserted that in this instance "removal from service" meant only that White had been suspended pending an investigation. (III Tr. 446, 491, 513). The jury, of course, was entitled to credit the testimony favorable to White.

White filed a timely grievance. After White had been out of work for 37 days, union officials were able to persuade higher BNSF officials to overturn the dismissal order. BNSF agreed to permit White to return to work, and gave her back pay for the 37 days she had been jobless.

White filed additional charges with EEOC and subsequently commenced the instant action, asserting inter alia that the transfer and rescinded dismissal were imposed in retaliation for her objection to alleged acts of sexual harassment and discrimination.

Title VII only forbids retaliatory acts that are harmful to the interests of the victim. Prior to trial, BNSF unsuccessfully moved for judgment as a matter of law on the ground that the retaliatory acts in this case were not serious enough to be adverse and thus unlawful. The district judge rejected that motion in light of the particular factual circumstances of this case. Regarding the removal of White from the forklift position, the judge concluded

> that the tremendous variation of assignments within the job classification means that we can't just look at the job classification to determine whether or not there was a change for her – in the conditions of her employment, and we can look at exactly what she was doing and not doing. . . . [The] pretty graphic distinctions within the range of assignments available and the fact that she went from, no question, an easy job to, I think without much doubt, the most difficult and

> dirtiest job within the range of jobs available in that classification [are] enough to allow this to go to the jury.[2]

Although BNSF had ultimately rescinded the decision to fire White, and had given her back pay for the period she was out of work, the district court concluded that was insufficient to undo the injuries suffered during the period when the dismissal decision was in effect.

> Did she get everything back if somebody retaliated against her based on protected activity? Absolutely not. She had Christmas without – I mean do I have to really recite the record? I mean she had Christmas without income, without a job, with total insecurity. She was depressed. Her daughter . . . says her mom was lethargic, just hardly the same person as she had been in the summer. So, you know, money is often the least of the damage inflicted in these types of cases. . . .[3]

The jury found for White on her retaliation claim, and awarded $43,250 in compensatory damages, including $3250 in medical expenses. The district judge subsequently denied on similar grounds BNSF's post-trial motion for judgment as a matter of law. (Pet. App. 118a-119a).

On appeal a majority of the panel that first heard this case concluded that the retaliatory acts were not sufficiently serious to be materially adverse and thus were not actionable under Title VII. (Pet. App. 84a-104a). After reconsidering that issue en banc, however, every member of the Sixth Circuit concluded that those retaliatory

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[2] Tr. 703-04.

[3] Tr. 706.

actions were sufficiently significant to be adverse and unlawful under Title VII. (Pet. App. 8a-25a, 35a, 50a). That conclusion was the result of a fact-bound evaluation of the particular circumstances of this case. In holding that the rescinded dismissal of White was an adverse and hence unlawful employment action, the Sixth Circuit relied in particular on the length of the period between the dismissal and the eventual rescission (Pet. App. 22a), the jury's undisputed[4] finding that the retaliation had caused White more than $43,000 in damages and medical bills (Pet. App. 23a), the fact that the initial dismissal was overturned only because White had filed a grievance (Pet. App. 24a), and the absence of the special considerations that exist in cases involving tenure denials. (Pet. App. 22a-23a n.7).

The en banc court took a similar fact-bound approach to the removal of White from the forklift position, stressing that the forklift job "required more qualifications, which is an indication of prestige," that the standard track laborer job was "by all accounts more arduous and 'dirtier,'" and the fact that the forklift job was regarded by other workers as so much a "better job [that] male employees resented White for occupying it." (Pet. App. 25a). Far from announcing any general rule that transfers are always sufficiently serious to constitute adverse employment actions, the Sixth Circuit held only that on the particular record before it "the reassignment was a demotion evidenced by 'indices . . . *unique to [the] particular situation.*'" (Pet. App. 25a) (quoting *Kocsis v. Multicare*

[4] In its appeal to the Sixth Circuit petitioner did not challenge the amount of the jury's award.

Mgmt. Inc., 97 F.3d 876, 886 (6th Cir. 1996) (emphasis added).

The Sixth Circuit also concluded that the district court had erred in instructing the jury that it could only award punitive damages if the plaintiff established by "clear and convincing evidence" that BNSF had acted with the requisite malice or reckless indifference. (Pet. App. 28a-33a). The court of appeals, however, did not hold that the district court on remand was required to hold a new trial on punitive damages. The Sixth Circuit further ruled that in the proceedings below the trial judge had made a second error (in this instance in favor of plaintiff) in holding that punitive damages could be awarded merely on a finding of intentional discrimination. Title VII requires a plaintiff seeking punitive damages to prove that the defendant acted with "malice or reckless indifference"; "this standard requires a plaintiff to prove more than merely intentional discrimination." (Pet. App. 33a). Having thus identified two errors in the jury instructions regarding punitive damages (one error favoring the defendant, the other error favoring the plaintiff), the appellate court remanded the case so that the trial judge could determine in the first instance whether plaintiff's evidence was sufficient – under the correct legal standard – to support a jury award of punitive damages. (Pet. App. 33a-34a). Only if the district judge on remand resolves that issue in favor of plaintiff will a trial on punitive damages be held.

ARGUMENT

I. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR RESOLVING THE FIRST QUESTION PRESENTED

A. PETITIONER DID NOT OBJECT IN THE COURTS BELOW TO THE "MATERIALLY-ADVERSE" STANDARD

The decision below held that the retaliatory acts that occurred in this case are actionable under Title VII because they constituted "materially adverse change[s] in the terms of [the plaintiff's] employment." (Pet. App. 10a). In this Court petitioner challenges the correctness of the materially-adverse standard, and urges this Court to grant review to decide whether to reject that standard and to adopt instead the "ultimate employment decision" standard.[5] In the lower courts, however, far from attacking the materially-adverse standard, counsel for petitioner repeatedly endorsed that very formulation, and argued instead that the particular facts of this case did not satisfy the materially-adverse standard. It is the well-founded practice of this Court to decline to consider questions not squarely advanced in the courts below.

In *City of Springfield v. Kibbe*, 480 U.S. 257 (1987), the petitioner asked to Court to decide whether a municipality could be held liable under section 1983 for gross negligence in the training of its police. After that issue had

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[5] Petitioner also asserts that this Court should grant review to consider the Ninth Circuit's deterrence standard, which assertedly conflicts with the majority materially-adverse standard. But since petitioner would certainly lose under the Ninth Circuit standard, there seems no possibility petitioner would actually urge the Court to adopt that standard in place of the materially-adverse standard.

been fully briefed on the merits, the Court dismissed the writ as improvidently granted because the petitioner had failed, at trial or on appeal, to object to a jury instruction that embodied the very legal standard which it sought to challenge in this Court.

> We ordinarily will not decide questions not raised or litigated in the lower courts. See *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957). That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict."

480 U.S. at 259.

The instant petition presents precisely the problem that led to the dismissal of the writ in *Kibbe*. At the conclusion of the trial the district judge without objection instructed the jury to apply the materially-adverse standard:

> To establish the third element of her retaliation claim – the existence of an adverse employment action – . . . the plaintiff must show that she suffered a materially adverse change in the terms or conditions of employment because of the employer's actions.

(IV Tr. 772). The trial judge then proceeded, again without objection, to explain to the jury how it should evaluate whether there had been a materially adverse change.

> In determining whether the plaintiff suffered a materially adverse change in the terms or conditions of her employment, you may consider the following:

1. Whether there was termination of employment.
2. Whether there was demotion, evidenced by decrease in wage or salary.
3. Whether there was . . . some less distinguished title.
4. Whether there was a material loss of benefits.
5. Whether there were significantly diminished material responsibilities.
6. Other indications that might be unique to a particular situation.

(IV Tr. 772-73).

In the litigation in the courts below, petitioner repeatedly insisted that "materially adverse" is the proper standard for assessing whether retaliatory conduct is sufficiently serious to violate Title VII. In its July 2000 motion for summary judgment, petitioner argued:

> The factors in proving a *materially adverse* change in the terms of employment for a retaliation claim are the same as for a discrimination claim. Accordingly, plaintiff must prove that she suffered a wage or salary decrease, a less distinguished title, a loss of benefits, or significantly diminished material responsibilities to show that the change in job duties was a *materially adverse* change in the terms of her employment with BNSF.[6]

The district court denied the summary judgment motion, applying the materially-adverse standard advocated by

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[6] Memorandum in Support of Defendant's Motion for Summary Judgment, p. 13 (emphasis added).

petitioner.[7] In September 2000, following the jury verdict in favor of White, petitioner moved for judgment as a matter of law, again arguing only that the evidence before the jury was insufficient to prove "a materially adverse change."[8]

In the Sixth Circuit petitioner filed a series of briefs endorsing the materially-adverse standard. In its first appellate brief, filed on August 1, 2001, petitioner explained that "[g]enerally, an adverse employment action is 'a materially adverse change in the terms and conditions of employment.' *Crady v. Liberty Natl. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993)."[9] Petitioner insisted that White had failed to offer sufficient evidence of "[t]he factors in proving a materially adverse change in the terms of employment",[10] repeatedly citing decisions from the Fifth, Eighth and Ninth Circuits, circuits which petitioner now insists have repudiated the materially-adverse standard.[11] In a brief filed on August 6, 2001, petitioner accused White of "tr[ying] to create a conflict among circuits where no clear conflict exists."[12] In its March 2003 brief before the en banc court, petitioner insisted:

> This Circuit has long held that an adverse employment action must be materially adverse. . . . The materiality standard enjoys wide support among the circuits, clearly representing the

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[7] Order Denying Defendant's Motion for Summary Judgment, p. 13.

[8] Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law Or, In The Alternative, for New Trial, p. 2.

[9] Final First Brief of Appellant/Cross-Appellee, p. 11.

[10] *Id.*

[11] *Id.* at 14-21.

[12] Final Third Brief of Appellant/Cross-Appellee, p. 17.

> majority standard. . . . The materiality standard . . . requires actual, tangible consequences before allowing a lawsuit.[13]

Petitioner in this brief asserted that the Ninth Circuit's standard conflicted with the materially-adverse standard, but urged the Sixth Circuit to adhere to the materially-adverse standard.[14] The "ultimate employment decision" standard in the Fifth and Eighth Circuits, petitioner insisted, did not require a greater degree of harm. Those Fifth and Eighth Circuit decisions, petitioner explained, were "widely mischaracterized"; "[p]roperly understood" the degree of harm demanded by those two circuits was "simply the materiality standard."[15]

Petitioner suggested in this March 2003 brief that even a materially adverse retaliatory action might be lawful if it were in some sense "not complete."[16] For this contention petitioner did not rely on any Sixth Circuit precedent (other than the by-then vacated panel opinion), but instead on decisions in the Fifth and Eighth Circuits. This portion of the March 2003 brief might have been read as proposing a departure from a mere requirement of material adverseness, a change that might be relevant to the rescinded-dismissal retaliation in the instant case.

But two months later petitioner filed yet another brief, this time emphatically opposing any departure from the materially-adverse standard. In this final brief, filed in May 2003, petitioner expressly insisted that the en banc

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[13] Supplemental Brief of Defendant/Appellant/Cross-Appellee on Rehearing En Banc, pp. 12-13.

[14] *Id.* at 17-18.

[15] *Id.* at 14-15.

[16] *Id.* at 12-15.

court *could not* apply any standard different than the existing Sixth Circuit "materially adverse" rule. Responding to White's suggestions that the en banc court utilize the Ninth Circuit standard rather than the materially-adverse standard, petitioner objected:

> White is mistaken in asking the Court to apply a new test to her case. This case was tried under the Court's materially-adverse standard without objection. The jury verdict White obtained was under that standard. . . . Thus, whatever the Court may do for future cases, the judgment here must stand or fall on the materially adverse standard set out in Hollins v. Atlantic Co., 188 F.3d 652 (6th Cir. 1999).[FN1]
>
> ---
>
> [FN1] See Moore v. Murphy, 47 F.3d 8, 11 (1st Cir. 1995) (unobjected to jury instructions became the law for the particular case).[17]

The Sixth Circuit en banc adhered to the materially-adverse standard, just as petitioner had urged. In applying the materially-adverse standard, the Sixth Circuit – unsurprisingly – indicated it was not adopting the Fifth Circuit's ultimate employment decision standard. But it did so only in the course of explaining why the en banc court was not following the reasoning of an earlier *Sixth Circuit* decision (Pet. App. 19a-21a), not because the court of appeals believed petitioner was urging that the ultimate employment decision standard should be adopted instead of the materially-adverse standard.[18]

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[17] Defendant/Appellant/Cross-Appellee's Reply Brief on Rehearing En Banc, p. 1.

[18] The portion of the opinion below under the heading "Defining Adverse Employment Action" refers only to the materially-adverse

(Continued on following page)

In sum, throughout more than four years of litigation in the courts below, petitioner embraced the Sixth Circuit's materially-adverse standard; only in its petition for certiorari does petitioner now assert that the materially-adverse standard is unsound and conflicts with the standards in the Fifth and Eighth Circuits. It is simply too late in the day to object to the materially-adverse standard for the first time.[19]

B. ANY DIFFERENCES AMONG THE STANDARDS IN THE COURTS OF APPEALS IS NOT DETERMINATIVE OF THE OUTCOME OF THIS CASE

Petitioner asserts that there is a difference between the Sixth Circuit's materially-adverse standard and the standard in the Ninth Circuit, which holds that a retaliatory action is unlawful if sufficiently serious to deter the filing of EEOC charges or other protected activity. See *Ray*

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standard and the Ninth Circuit standard, noting that White and the EEOC had urged the adoption of the latter. (Pet. App. 15a-18a). The court's discussion of the Fifth Circuit standard occurs under the heading "Suspension Without Pay," and contains no reference to any party having advocated adoption of that standard. (Pet. App. 19a-24a).

[19] Petitioner argues, in the alternative, that the Sixth Circuit misapplied the materially-adverse standard:

> Nominally, the Sixth Circuit's standard – that an "adverse employment action" occurs when an employee is subjected to "'a materially adverse change in the terms of her employment,'" Pet. App. 13a – mirrors the standard adopted by eight other circuits. In practice, however, it departs from decisions of some of those courts that employ the same terminology of "materially adverse change."

(Petition, pp. 14-15) (footnote omitted). But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

v. Henderson, 217 F.3d 1234 (9th Cir. 2000). This is not an appropriate case in which to resolve any such difference. The Ninth Circuit standard, to the extent that it differs in practice from the Sixth Circuit standard, is *less* favorable to petitioner. In the court of appeals, petitioner successfully argued *against* the Ninth Circuit standard,[20] and assuredly would do so here. Petitioner is not an appropriate party to litigate whether this Court should adopt the Ninth Circuit standard rather than the Sixth Circuit standard because it would lose under either standard.

Although petitioner now favors the Fifth Circuit "ultimate employment decision" standard, it has failed to demonstrate that it would prevail even if that standard were adopted. To the contrary, the harm caused by the retaliatory actions in the instant case – leading to a $43,250 jury verdict, the amount of which petitioner has not challenged – was sufficiently serious that those actions would be unlawful even in the Fifth Circuit.

The Fifth Circuit does not hold that all retaliatory job transfers are lawful. To the contrary, that circuit has repeatedly held that a retaliatory transfer *is* forbidden by Title VII where the differences in job duties are so substantial that the transfer amounts to a demotion. *Harper v. City of Jackson Municipal School Dist.*, 2005 WL 2404813 *8 (5th Cir. Sept. 30, 2005); *Sharp v. City of Houston*, 164 F.3d 923, 933 n.2 (5th Cir. 1999). In the instant case, the Sixth Circuit concluded, in light of the unique circumstances of this case, that removing White from her position as the forklift operator "[i]n essence . . . was a demotion." (Pet. App. 25a). The correctness of that fact-bound evaluation of the evidence simply does not warrant review by this Court.

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[20] Supplemental Brief of Defendant/Appellant/Cross-Appellee on Rehearing En Banc, pp. 17-19.

The Fifth Circuit's requirement that an adverse employment action be an "ultimate" employment decision is intended primarily to screen out actions (like a negative performance evaluation) that may in the future result in an action such as a dismissal. Petitioner has not identified any case in the Fifth Circuit holding that actions that ordinarily are ultimate employment decisions (e.g., dismissal, demotion, reduction in pay, denial of a promotion) would not be unlawful under Title VII if the employer later rescinded them. Petitioner insists that the rescinded dismissal in this case would not have been actionable in the Fifth Circuit (Pet. 16-17), but none of the three Fifth Circuit cases it cites involved the rescission of a discharge or even the rescission of an avowedly interim form of discipline.[21]

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[21] In *Zaffuto v. City of Hammond*, 308 F.3d 485 (5th Cir. 2002), the allegedly retaliatory action was the suspension of the plaintiff for 240 hours. It is unclear whether or not the plaintiff was paid during this suspension, which in any event was never rescinded. The court of appeals expressly did not decide whether the suspension constituted an ultimate employment decision. 308 F.3d 493.

In *Brazoria County, Texas v. EEOC*, 391 F.3d 685 (5th Cir. 2004), the retaliation took the form of ostracism by a county official. In holding that that was not actionable, the Fifth Circuit emphasized "that even courts that do not apply an 'ultimate employment decision' standard have rejected retaliation on the basis of ostracism. *E.g., Manatt v. Bank of America, NA*, 339 F.3d 792, 803 (9th Cir. 2003)." 391 F.3d at 693. The complaint also alleged that that county official had retaliated against the plaintiff, *after she resigned*, by writing a letter accusing her husband of theft. 391 F.3d at 692-93. That letter obviously had no affect whatsoever on the terms and conditions of the plaintiff's already terminated employment.

In *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528 (5th Cir. 2003), the plaintiff alleged that, *after she had been fired*, the employer retaliated against her by filing a counterclaim in her federal employment discrimination case.

(Continued on following page)

II. THE FACT-BOUND DISPUTE IN THIS CASE REGARDING WHETHER THE RETALIATORY CONDUCT CONSTITUTED AN ADVERSE EMPLOYMENT ACTION DOES NOT PRESENT AN INTER-CIRCUIT CONFLICT WARRANTING REVIEW BY THIS COURT

Litigation about whether a particular retaliatory act is sufficiently serious to constitute an adverse employment action, and thus violate Title VII, presents intensely fact-bound disputes. Retaliatory acts come in infinite varieties, with innumerable types of differences in the actions of the defendants, the context of the work-site settings and rules within which they occur, and the impact on the victims. Although there are some differences in the terminology used in the lower courts to characterize the retaliatory acts that are of sufficient severity to be unlawful, in practice that terminology is far less important than the specific circumstances of each particular case.

Even the differences in the terminology utilized in the various courts of appeals are of limited scope and significance. Petitioner correctly acknowledges that nine circuits (including the Sixth Circuit) agree that a retaliatory action is unlawful if it results in "materially adverse" changes in the conditions of the victim's employment.

Petitioner argues that the Eighth Circuit rejects this majority standard, citing *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997). (Pet. 12). But the "ultimate employment decision" standard certainly is not the law in the Eighth Circuit today, if indeed it ever was. The last decade of Eighth Circuit caselaw regarding what constitutes an

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In none of these cases did the alleged retaliation involve some form of rescinded or corrected retaliatory act.

adverse employment action in fact underscores the often semantic nature of this entire issue. Prior to *Ledergerber*, the standard applied in the Eighth Circuit was whether a change in working conditions caused a "materially significant disadvantage." *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The decision in *Ledergerber*, although using the phrase "ultimate employment decision," 122 F.3d at 1145, did not intend to alter the controlling Eighth Circuit standard; to the contrary, the opinion in *Ledergerber also* characterized the applicable standard as "materially significant disadvantage" (quoting *Harlston*), "materially adverse," "materially altered" and "material change." 122 F.3d at 1145. Clearly the panel in *Ledergerber* regarded all of these phrases, which included both the current Fifth and Sixth Circuit formulations, as synonymous. Shortly after *Ledergerber*, in *Manning v. Metropolitan Life Insurance Co.*, 127 F.3d 686 (8th Cir. 1997), the Eighth Circuit again treated "material employment disadvantage" and "ultimate employment decision" as articulating the same standard.[22] Two subsequent Eighth Circuit decisions stated that a plaintiff could prevail by showing either a "material employment disadvantage" *or* an "ultimate

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[22] 127 F.3d at 692:

> Absent some more tangible change in duties or working conditions that constituted a *material employment disadvantage*, we must agree with the district court that [the plaintiffs] did not present evidence sufficient to demonstrate any adverse employment action that constitutes the sort of *ultimate employment decision* intended to be actionable under Title VII.

(Emphasis added). In this passage, the Eighth Circuit explains, in effect, that the proof of a material employment disadvantage would *demonstrate* the existence of an ultimate employment decision.

employment decision."[23] The phrase "ultimate employment decision" has not been utilized in any Eighth Circuit retaliation case for several years. Several post-*Ledergerber* Eighth Circuit decisions use the Sixth Circuit's "materially adverse" formulation.[24] The most recent Eighth Circuit decisions utilize the phrase "material employment disadvantage."[25] There assuredly is no deep and intractable conflict, or even an intelligible distinction, between "material . . . disadvantage" and "materially adverse."

The decision below did disapprove the Ninth Circuit's formulation, which holds actionable any retaliatory act sufficiently serious to deter a reasonable person from engaging in protected activity. (Pet. App. 15a-19a; see *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)). But it is far from clear that this difference is more than merely semantic. Fear of a "materially adverse" change in working conditions would presumably be sufficient to reasonably deter protected conduct, while the prospect of a non-material change would be unlikely to do so. The Ninth Circuit decision announcing the deterrence standard insisted that that standard is essentially the same as the standards in the First, Seventh, Tenth, Eleventh and D.C. Circuits,[26] all of which petitioner (now) insists are quite

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[23] *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999); *Cross v. Cleaver*, 142 F.3d 1059, 1073 (8th Cir. 1998).

[24] *Saulsberry v. St. Mary's University of Minnesota*, 318 F.3d 862, 868 (8th Cir. 2003); *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001); *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1245 (8th Cir. 1998).

[25] *Singletary v. Missouri Department of Corrections*, ___ F.3d ___, 2005 WL 2218039 (8th Cir. Sept. 14, 2005); *Davis v. KARK-TV, Inc.*, 421 F.3d 699, 706 (8th Cir. 2005); *Zhuang v. Datacard Corporation*, 414 F.3d 849 (8th Cir. 2005).

[26] *Ray v. Henderson*, 217 F.3d at 1241.

different from the Ninth Circuit standard. Both the Sixth and Ninth Circuits have explained that the purpose of their standards is to bar claims based on actions which are "trivial." *Compare* Pet. App. 10a, 16a *with Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). Like the Eighth Circuit, the Ninth Circuit at times uses a number of different alternative formulations interchangeably to characterize those retaliatory actions which are sufficiently adverse to be actionable. E.g., *James v. C-Tran*, 130 Fed. Appx. 156, 157 (9th Cir. 2005) (issue is whether retaliatory actions did or did not "materially impact [the plaintiff's] terms, conditions, or privileges of employment"); *Vasquez v. County of Los Angeles*, 307 F.3d 884, 891 (11th Cir. 2002) ("whether a reasonable person in the same situation would view the [retaliatory] action as disadvantageous"). It is not at all clear in what circumstances (if any) the Ninth Circuit deterrence standard and the Sixth Circuit materially-adverse standard would actually yield different results. Those standards assuredly would lead to the same result in the instant case.

Petitioner is incorrect in asserting that the decision below conflicts with the decision of the Seventh Circuit in *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132 (7th Cir. 1993). The petition states that

> The Seventh Circuit has held that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities," and that a transfer to a new job with – as here – the same salary and benefits, and different but not less significant responsibilities, was not actionable. *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993).

(Petition, pp. 14-15). The last twenty-five words of this assertion, however, are not quoted from the Seventh Circuit decision in *Crady* itself, and do not accurately depict the holding of that case. The next sentence in *Crady* actually reads as follows:

> A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, *or other indices that might be unique to a particular situation.*

993 F.2d at 136 (emphasis added). This is precisely the formulation quoted and applied by the Sixth Circuit in this very case. (Pet. App. 13a (quoting *Kocsis v. Multi-Care Management Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (quoting *Crady*)), 25a (applying the "indices . . . unique to [the] particularly situation" standard from *Kocsis* and *Crady*)).

That leaves only the Fifth Circuit's ultimate employment decision cases as a possible justification for a grant of certiorari. But petitioner has not established – indeed, has barely argued – that the serious injuries and types of retaliation involved in the instant case would not also be actionable in the Fifth Circuit. It is not sufficient that there are some differences in the articulated standards in the Fifth and Sixth Circuits. Despite such differences, those circuits in practice readily agree regarding the numerous cases that are either fairly serious or manifestly trivial. The question is not whether there is a conflict between the Fifth and Sixth Circuits regarding the lawfulness under Title VII of *some* retaliatory actions, but whether there is such a conflict regarding the legality of the particular actions in *this* case.

Petitioner does not contend that employers which want to retaliate against workers who file charges with the EEOC are entitled to a clear understanding of what types of retaliatory sanctions they can impose. And BNSF does not argue that it faces any administrative problem because it has to use different retaliatory practices in different circuits; to the contrary, BNSF of course does not claim to have a policy of retaliating against its employees.

Petitioner and several amici suggest that employers will be afraid to transfer or alter the duties of charging parties if such workplace changes could become elements of a retaliation claim. But they express no similar concern about judicial scrutiny of dismissals, demotions and promotions affecting charging parties, actions in which an employer often will have a far greater interest and which could give rise to significantly greater financial liability if found to be tainted by an unlawful retaliatory motive. Although these and most other employment decisions are sufficiently serious to be unlawful if motivated by a discriminatory or retaliatory purpose, that prospect has not inhibited the ability or willingness of employers to make such decisions on the basis of merit or other legitimate business interests. To be sure, the prospect that lower level managers might retaliate against charging parties (and that such retaliation could in turn result in a successful Title VII suit) might encourage higher officials to scrutinize adverse actions taken, as here, shortly after an employee filed a charge with EEOC or with the company's own personnel department. But that would be a wholly salutary consequence; the central purpose of monetary relief under Title VII is to provide "the spur or catalyst

which causes employers ... to self-examine and self-evaluate their employment practices." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

III. THERE IS NO CONFLICT REGARDING THE STANDARD OF PROOF FOR AWARDING PUNITIVE DAMAGES UNDER TITLE VII

Petitioner does not claim that there is any inter-circuit conflict regarding the standard of proof for Title VII punitive damage awards. The other circuits that have expressly addressed this question agree with the Sixth Circuit that the elements of a punitive damage claim need only be proven by a preponderance of the evidence. In reaching that conclusion in *Karnes v. SCI Colorado Funeral Services, Inc.*, 162 F.3d 1077 (10th Cir. 1998), the Tenth Circuit commented that

> [the defendant] has not identified, nor have we found, any federal case applying the more stringent clear and convincing or beyond a reasonable doubt standards to punitive damages claims under Title VII.

162 F.3d at 1081. Similarly, the Fourth Circuit, in affirming the applicability of the preponderance of the evidence standard, emphasized that "[w]e are aware of no authority to the contrary." *Notter v. North Hand Protection*, 1996 WL 342008 *11 (4th Cir. June 21, 1996). The courts of appeals

in the Fifth,[27] Seventh,[28] Eighth,[29] Ninth[30] and Eleventh[31] Circuits have promulgated Model Jury Instructions for punitive damage claims that incorporate the preponderance of the evidence standard.

Petitioner states that the use of the preponderance of the evidence standard under Title VII "is contrary to the overwhelming trend in the states." (Petition, p. 24). But petitioner does not suggest the Sixth Circuit's interpretation of Title VII conflicts with a different interpretation of Title VII handed down by any state court of last resort. See Sup. Ct. Rule 10(a). None of the state cases referred to by the dissenting opinion below involved an interpretation of the standard of proof for an award of punitive damages under Title VII. For example, in 1992, the Tennessee Supreme Court announced what it acknowledged was a "modification" of the standard for awarding punitive damages under Tennessee statutory or common law claims, for the first time requiring proof by clear and convincing evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900-01 (Tenn. 1992); *id.* at 902 ("Our decision today substantially changes Tennessee law governing the availability of punitive damages."); see Pet. App. 76a. That

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[27] Fifth Circuit Pattern Jury Instructions Civil, pp. 29 (Instruction 3.1) and 208-09 (Instruction 15.13) (2005).

[28] Seventh Circuit Federal Jury Instructions Civil, pp. 90-92 (Instruction 3.13) (2005).

[29] Eighth Circuit Manual of Model Jury Instructions Civil, pp. 94-97 (Instruction 5.02C) (2005).

[30] Ninth Circuit Manual of Model Jury Instructions Civil, pp. 85-86 (Instruction 7.5) (2001).

[31] Eleventh Circuit Pattern Jury Instructions, Instruction 6.1, Supplemental Damages Instruction 2.1 (1999) (*reprinted in* Modern Federal Jury Instructions, Civil Pattern Instructions (LEXIS-NEXIS).

state court construction of Tennessee law obviously does not conflict with the Sixth Circuit's interpretation of a different law, the provision of the 1991 Civil Rights Act authorizing punitive damages in Title VII cases.

The only state "trend" consists either of recent state statutes that (unlike Title VII) have an express "clear and convincing" standard, or state judicial decisions interpreting *state* punitive damage statutes or common law remedies. The state courts themselves understand the difference between the standards applicable to federal claims and those applicable to state claims. In *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998), the Colorado Supreme Court held that Title VII requires only proof by a preponderance of the evidence for an award of punitive damages, despite the fact that a Colorado statute required proof beyond a reasonable doubt in state law cases. 969 P.2d at 678-81.

The decision below assuredly is not "flatly incompatible with this Court's precedents." (Pet. 24). This Court has never decided that Title VII, or any other federal punitive damage statute, requires proof by clear and convincing evidence. To the contrary, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989), this Court held that "[c]onventional rules of civil litigation generally apply in Title VII cases . . . and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." In March 1991, this Court observed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), that

> [t]here is much to be said in favor of a State's requiring, as many do, see *e.g.*, Ohio Rev. Code Ann. § 2307.80 (Supp. 1989), a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," see Colo. Rev. Stat. § 13-25-127(2) (1987) as in the criminal context.

499 U.S. at 23 n.11. But this comment obviously did not constitute an interpretation of the punitive damage provision in the 1991 Civil Rights Act, which was not enacted until nine months later. If footnote 11 could be read as a suggestion that Congress should adopt language like that in the cited Ohio or Colorado statutes, it was a suggestion which Congress opted not to follow in fashioning the text of the 1991 Act.

Petitioner urges this Court to grant certiorari to hold that *all* federal statutes that authorize punitive damages require proof by clear and convincing evidence, unless the statute in question expressly provides for a lesser standard of proof. (Pet. 22).[32] Petitioner does not, however, suggest that this Court, any federal court of appeals, or any state court of last resort have ever adopted or (before the instant case) even considered any such rule of construction for federal statutes. Petitioner advanced no such argument in the Sixth Circuit; indeed, among the four briefs filed by petitioner in the court below, there is only a single seven-sentence paragraph, limited to the construction of Title VII, discussing the standard for punitive damages.[33] The dissenting opinion below is scholarly and provocative, but it also appears to be the first instance in which any appellate federal judge has advanced this argument. If in the fullness of time other courts of appeals are persuaded by the reasoning in that dissent, the resulting conflict might then warrant review by this Court. But that day has not yet arrived, and it may well never do so.

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[32] Such a rule would override the deliberate choice of Congress to require only in some statutes, but not in Title VII, that proof regarding punitive damages be by clear and convincing evidence. See 15 U.S.C. § 6604(a); 20 U.S.C. § 6736(c)(1); 42 U.S.C. § 14503(e)(1).

[33] Final Third Brief of Appellant/Cross-Appellee, p. 34.

Review at this time is particularly inappropriate because the instant litigation regarding punitive damages is far from final. The district court has been instructed on remand first to decide whether White has offered sufficient evidence to support an award of punitive damages under the correct legal standard; if BNSF prevails on that issue, punitive damages will be denied. Even if a trial is held on this issue, the jury may conclude that White has not proved by a preponderance of the evidence that punitive damages should be awarded. If BNSF is successful on either of these issues, any appeal (by White) from that final judgment will no longer raise any issue about the appropriate burden for obtaining punitive damages in a Title VII case.

The petition also argues that, if a new trial on punitive damages is to be held, the jury should be directed to re-decide as well the merits of White's retaliation claim. (Pet. 25). Petitioner contends that in the particular circumstances of this case the order of the Sixth Circuit is inconsistent with the decision of this Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), and the Fifth Circuit's decision in *Hardin v. Caterpillar, Inc.*, 227 F.3d 268 (5th Cir. 2000). But neither *Gasoline Products* nor *Hardin* hold that a separate trial on punitive damages only is never permissible. *Gasoline Products* actually concerned whether a separate trial could be held on *compensatory* damages only; it held that such trials are indeed permissible if "a trial of it alone may be had without injustice." 283 U.S. at 500. *Hardin* expressly held that trials of punitive damages only *are* permissible, although not in the circumstances of that case.[34] This

[34] 227 F.3d at 272-73:

> We are persuaded of the practical inseparability of the issues of intent, of damages for emotional injury, and of punitive damages *in this case*, a conclusion we can and do reach without deciding

(Continued on following page)

aspect of the second question presented thus raises only a fact-bound dispute about the appropriateness of a punitive-damages-only trial under the particular circumstances of this case. And, like the dispute about the standard of proof, there is not yet a final determination that a retrial regarding punitive damages will actually be held.

CONCLUSION

For the above reasons, certiorari should be denied.

Respectfully submitted,

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that they are inseparable as a matter of law across all cases; and we do not suggest that punitive damages may not walk alone in other contexts. See *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.*, 582 F.2d 984 (5th Cir. 1978).

(Emphasis added). The court of appeals in *Black* directed a retrial on punitive damages only. 582 F.2d at 991.

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No. 05-259

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RULE 29.6 STATEMENT

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2 Lex K. Larson, *Employment Discrimination* (2d ed. 2005)	2

REPLY BRIEF

In its petition, BNSF demonstrated a deep, three-way division of authority among the federal courts of appeals on the proof necessary for employer liability under Title VII's anti-retaliation provision. Respondent grudgingly acknowledges a conflict between the court below and at least the Fifth Circuit, but claims that this case is not a good vehicle for resolving it. Her theory is that BNSF would not prevail under the Fifth Circuit standard, and that BNSF did not preserve the question presented. The Fifth Circuit, however, has expressly held that neither interim employment actions nor undesirable work assignments are actionable under Title VII. Thus, that court would grant BNSF judgment as a matter of law on respondent's claims of retaliation based on relief of her forklift duties and her temporary suspension pending an investigation that led to her reinstatement with full back pay. In any event, multiple circuits (not just the Fifth) have held that corrected actions and altered job duties do not constitute retaliation that is actionable under Title VII. Finally, contrary to respondent's claims, BNSF preserved the question presented in its motions for judgment as a matter of law at trial. Nothing more is needed to preserve the question for review.

Respondent's brief in opposition is remarkable for what it does not contest. It does not dispute that there is a substantial conflict in the circuits (not limited to the Fifth Circuit) over whether a supervisor's retaliation that is corrected by management is actionable. Nor does it contest that the Sixth Circuit's rule is irreconcilable with this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). Indeed, despite the extensive analysis of *Ellerth* in the petition, Pet. 12-13, 19, respondent does not so much as cite that decision, much less discuss or distinguish it. This Court should grant the first question presented to resolve the mature conflict on retaliation liability, and the second question to resolve both the standard of proof for punitive damages and the permissibility of having a second jury in a punitive damages trial

retry the same facts that already are the basis of the judgment on liability and compensatory damages.

1. As numerous courts of appeals and scholars have commented, there is a deep and mature three-way circuit split on the question of what conduct creates employer liability for retaliation under Title VII. Pet. 10-17; 2 Lex K. Larson, *Employment Discrimination* § 34.04, at 34-47 (2d ed. 2005). At least five courts of appeals have acknowledged this division of authority, including the decision below. See Pet. 10.

Respondent concedes that there is a conflict in the circuits. Opp. 1 ("The Fifth Circuit's 'ultimate employment decision' standard may lead in some cases to a result different from that under the standard in the other eleven circuits."). Indeed, the Fifth Circuit itself has stated that "[o]ur court has analyzed the 'adverse employment action' element in a stricter sense than some other circuits.'" *Hernandez* v. *Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir.), *cert. denied*, 540 U.S. 817 (2003).

Respondent insists, however, that there is no *three-way* split on this issue. Specifically, she argues that there is no conflict between the Sixth and Ninth Circuits because the latter "uses a number of different alternative formulations interchangeably to characterize those retaliatory actions which are significantly adverse to be actionable," and some have a similar ring to the Sixth Circuit's "materially adverse" standard. Opp. 21-22. This argument is irrelevant, even were it correct, because a mature two-way split, even a lopsided one, warrants this Court's intervention. *E.g.*, *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 125 n.8 (1990). But the argument is wrong in any event. The Sixth Circuit expressly "reject[ed]" the Ninth Circuit standard, precisely because the Ninth Circuit does not limit liability to actions that materially affect the "terms and conditions" of employment. Pet. App. 18a. Other courts have done likewise. See Pet. 15-16. There is an entrenched, three-way split in the circuits on this question, spearheaded by the Fifth, Sixth, and Ninth Circuits, even

if it is less clear in which camp the other circuits fall. This Court's intervention is fully warranted.[1]

2. BNSF clearly would have prevailed under the Fifth Circuit's "ultimate employment decision" standard, and respondent's argument to the contrary is based on a mischaracterization of Fifth Circuit precedent. Respondent cites only two Fifth Circuit cases in support of her claim: *Harper* v. *City of Jackson Mun. Sch. Dist.*, No. 05-60232, 2005 WL 2404813 (5th Cir. Sept. 30, 2005), and *Sharp* v. *City of Houston*, 164 F.3d 923 (5th Cir. 1999). Opp. 17. Neither supports her argument, and *Harper*, while citable, is not Fifth Circuit precedent in any event. See 5th Cir. L.R. 47.1a.

These cases stand for the proposition, undisputed by BNSF, that reassignment to a new *position* in the company, with such different responsibilities that the transfer amounts to a demotion, is actionable as an ultimate employment decision even in the absence of changed pay or benefits. *Sharp* held that "'a transfer may ... constitute a demotion'" if "the *new position* proves objectively worse." 164 F.3d at 933 & n.2 (emphasis added) (jury could find "transferring from the elite Mounted Patrol to a teaching post at the Police Academy" to be a demotion)[2]; *Burger* v. *Central Park Apt. Mgmt., Inc.*, 168 F.3d

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[1] While BNSF does not advocate the Ninth Circuit standard, respondent incorrectly states that BNSF would not be entitled to reversal if this Court adopted the Ninth Circuit rule because "Petitioner clearly would lose under the Ninth Circuit standard." Opp. 1, 22. That would be an issue for the jury to decide, not respondent. The question of whether an action is "materially adverse" under the Sixth Circuit standard is separate and distinct from whether "'any adverse treatment ... is reasonably likely to deter the charging party or others from engaging in protected activity.'" *Ray* v. *Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000). The latter test is concerned not only with materiality, but also likelihood of deterrence. The jury below did not find that the alleged such actions were likely to deter protected activity. If this Court were to embrace the Ninth Circuit's standard, the proper course would be to remand for a new trial under that standard. *Ellerth*, 524 U.S. at 765-66.

[2] *Sharp* arose under 42 U.S.C. § 1983, not Title VII. The Fifth Circuit held that, although there may be differences between section 1983 and

875, 879 (5th Cir. 1999) (transfer to an inferior position is actionable, but lateral transfer is not actionable even if it affects working conditions). But the Fifth Circuit has expressly held that "ultimate employment decisions" do not include "loss of some job duties," an "assignment to [a] less desirable shift and formal discipline," "removal from duties on [a] particular account," or a "request that [the] employee perform new job tasks." *Hernandez*, 321 F.3d at 532 n.2.[3] As the very case respondent cites succinctly puts it, in a passage she fails to quote: "undesirable work assignments are not adverse employment actions." *Harper*, 2005 WL 2404813, at *7 (alteration omitted) (quoting *Southard* v. *Texas Bd. of Criminal Justice*, 114 F.3d 539, 555 (5th Cir. 1997)).

These are the same distinctions that *Ellerth* drew in defining "tangible employment actions" under Title VII:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits.... A tangible employment action in most cases inflicts direct economic harm.

524 U.S. at 761-62 (emphasis added). Reassignment to a different and demonstrably worse position in the company may constitute "a significant change in employment status" akin to hiring, firing, failure to promote, or reduction in pay or benefits. But where (as here) the employee maintains the exact same position, at the same location with the same seniority,

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Title VII standards, a transfer resulting in demotion would be an "adverse employment action" under either law. 164 F.3d at 933 n.2.

[3] *See Mota* v. *University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2001); *Thomas* v. *Texas Dep't of Criminal Justice*, 220 F.3d 389, 394 (5th Cir. 2000); *Walker* v. *Thompson*, 214 F.3d 615, 629 (5th Cir. 2000); *Watts* v. *Kroger Co.*, 170 F.3d 505, 511-12 (5th Cir. 1999); *Bennett* v. *Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998) (requiring employee to perform manual tasks not an ultimate employment decision).

and is simply given different (arguably less desirable) tasks, that is not a change in employment status that is actionable under *Ellerth* or Fifth Circuit precedent. That is particularly so when the tasks are within the employee's craft and job description, and are responsibilities that she and other employees in the same job classification already perform. Pet. 11-13. Unlike an actual job transfer, a supervisor's decision to relieve an employee of certain preferred tasks does not "require[] an official act of the enterprise, a company act," and is thus not a tangible employment action that can give rise to Title VII liability. *Ellerth*, 524 U.S. at 762.[4]

Finally, as to her other retaliation claim, even respondent does not go so far as to claim that a temporary suspension without pay that is *reversed* and *corrected* with full back pay by senior management would constitute an "ultimate employment decision" under Fifth Circuit law. Rather, respondent weakly argues that petitioner does not cite a case to that effect from the Fifth Circuit. Opp. 18 & n.21. But an "ultimate employment decision" by definition excludes interim, reversible, and reversed actions, and the Fifth Circuit, like other courts of appeals, indeed has held that such supposed retaliation is not actionable. *Breaux* v. *City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000); *Benningfield* v. *City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998) ("[Because] the reprimand was rescinded through internal ... procedures ... [it] does not constitute an adverse employment action."); 157 F.3d at 378 ("We need not address whether a mere delay in promotion constitutes an adverse employment action because Benningfield received the promotion with retroactive pay and seniority."). "Title VII's anti-retaliation provision refers to

[4] Respondent tries to escape the force of these decisions by characterizing her forklift duties as a "forklift position." Opp. 3. But the undisputed evidence is that there is no such classified position (as Respondent concedes, *see id.*); that at all relevant times Respondent was a "track laborer"; and that she performed other tasks besides driving the forklift. Pet. 4; *see* II Trial Tr. 194-96 (Respondent worked in "the yard," and spent a "good bit of [her] time to assist in maintaining the switches" on the tracks).

ultimate employment decisions, and not to an 'interlocutory or mediate' decision which can lead to an ultimate decision." *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997). That necessarily excludes temporary suspensions with pay that are rescinded by senior management.[5]

3. In short, Fifth Circuit law starkly conflicts with the rule adopted below, and it favors BNSF. And, in any event, the conflict of authority extends well beyond the Fifth Circuit on the issues presented in this case. Respondent claims that because other circuits use nomenclature similar to the Sixth Circuit's, they would reach the same result in this case. Opp. 19-23. That is not so. As to both changes in work duties and corrected supervisory actions, the decision below is in conflict with multiple courts of appeals, regardless of those courts' verbal formulation of the general standard.[6]

BNSF and its *amici* have demonstrated that at least three other circuits have joined the Fifth in rejecting the Sixth Circuit's position that a change in work duties can constitute actionable retaliation. Pet. 14-15 & n.4; Br. of *Amicus Curiae* Association of American Railroads ("AAR Br.") at 5-7.[7]

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[5] Respondent now states that she was "'discharged'" or "'dismissed," rather than suspended. Opp. 5-6. This assertion, immaterial in any event to the decision to grant certiorari, is directly contradicted by respondent's own trial testimony, *see* II Trial Tr. 187; *see also id.* at 215, as well as her complaint, *see* Compl. at 5 (6th Cir. J.A. at 16), and the charge she filed with the EEOC, *see* 6th Cir. J.A. at 28 ("I was put on suspension pending an investigation."), in each of which she referred to her "suspension."

[6] Similar to respondent's quibble over verbal formulations of the legal standard, she also argues that this case is fact-bound. Opp. 19. This argument misses the point. The dispute here is not over facts—BNSF challenges the *legal rule* below that alternate work assignments and rescinded suspensions are actionable under Title VII.

[7] *See Conley* v. *Village of Bedford Park*, 215 F.3d 703, 712 (7th Cir. 2000) (no adverse employment action because "the assignment seems to be well within the scope of normal activities for a Village maintenance worker"); *Brown* v. *Brody*, 199 F.3d 446, 451-52 (D.C. Cir. 1999) ("changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in

Similarly, BNSF and its *amici* have shown that, in conflict with the Sixth Circuit, at least five circuits—the Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits—hold that "[a]n employer may cure an adverse employment action ... before that action is the subject of litigation." *Taylor* v. *Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *Pennington* v. *City of Huntsville*, 261 F.3d 1262, 1267–68 (11th Cir. 2001) ("the employment action is not adverse ... when the action is rescinded and backpay is awarded."); see Pet. 16-17 & n.5; AAR Br. 8-9. Other than her argument about Fifth Circuit case law (which is mistaken in any event, see *supra* at 3-6), respondent does not even address this conflict.

4. Unable to rebut the circuit conflicts, respondent is left to argue that BNSF did not preserve the question presented, purportedly because BNSF did not ask for "an ultimate employment decision" jury instruction and instead embraced the "materially adverse" standard. Opp. 10-16. This argument is unsound in multiple respects.

As an initial matter, respondent mischaracterizes BNSF's position. BNSF has never claimed that courts must adopt a specific verbal formulation of the Title VII retaliation standard. Whether this Court chooses "ultimate employment decision," "tangible employment action," or "materially adverse

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salary or work hour changes"); *Harlston* v. *McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994); *Crady* v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) ("mere inconvenience or an alteration of job responsibilities" not enough). Respondent attempts (Opp. 22-23) to distinguish one of these cases, *Crady*, by pointing to language that an actionable demotion can be proven by "other indices that might be unique to a particular situation." 993 F.2d at 136. But *Crady*—which addressed the demotion and transfer of an assistant vice president and manager at one bank location to loan officer at another location, *id.* at 133—holds that whether a job *transfer* can be considered an actionable demotion may be proven by factors other than decreased pay and benefits or "significantly diminished material responsibilities." *Id.* at 136. It does not hold (as the Sixth Circuit did) that a supervisor's reallocation of duties within the same position is actionable.

employment action" is largely a matter of indifference. The key question is the *content* of the standard, and BNSF's position has always been that the content of the Fifth Circuit's standard is correct. Moreover, BNSF had no reason to quarrel with the Sixth Circuit's "materially adverse" standard at trial because prior to the decision below, BNSF would have prevailed under that standard, which had been interpreted fully consistently with the Fifth Circuit standard. Pet. 13-15; Br. of Equal Employment Advisory Council ("EEAC Br.") at 9 (noting that the Sixth Circuit "so diluted the 'materially adverse' standard as to allow anything to satisfy it, in further conflict with other courts that have adopted the same nominal standard"); Opp. 14 (acknowledging that BNSF has consistently argued prior to the decision below that the Fifth and Sixth Circuit standards were coextensive). Indeed, the panel below, applying prior Sixth Circuit law, ruled in BNSF's favor. Pet. App. 94a-103a.

In all events, respondent's reliance on *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987), is misplaced because BNSF is not claiming instructional error. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513-14 (1988). Rather, BNSF's claim is that the alleged retaliation—being relieved of forklift duties, and a suspension without pay that was later rescinded with back pay—are not actionable under section 704 of Title VII *as a matter of law*. There is no dispute that BNSF raised that claim in its motions for judgment as a matter of law (JMOL) both before and after verdict. See III Trial Tr. 688, 694-706; Mem. in Support of Def.'s Mot. for JMOL or, in the Alternative, for New Trial 3-6; Opp. 12-16. When a party raises its defense in a JMOL motion, the point is preserved for review no matter the law on which the jury was instructed. *Boyle*, 487 U.S. at 513-14; *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988) (plurality); 9A Wright & Miller, *Federal Practice and Procedure* § 2537, at 348-49 & n.14 (2d ed. 1995 & Cum. Supp. 2005); *id.* § 2558, at 460-61 & n.9.

5. BNSF and its *amici* have demonstrated the untoward effects that the Sixth Circuit's broad expansion of Title VII to include claims related to work assignments and temporary suspensions (even when rescinded with full back pay) would have on the nation's employers. Respondent does not respond to the analysis that the rule below would severely prejudice employers in the necessary task of temporarily removing from active service employees whose actions create safety hazards or workplace disruptions. Pet. 19-20; AAR Br. 16-18; EEAC Br. 5-6, 13-16. As to work assignments, no disinterested observer would deem it "wholly salutary" (Opp. 24) to enmesh senior management in scrutinizing every supervisor's task assignments to all employees involved in Title VII charges. Title VII was "not intended to diminish traditional management prerogatives," *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (quotation omitted), nor to force employers to tighten the reins on ordinary supervision of employees simply because a Title VII charge has been filed. Not only would such intervention be wasteful and impractical, but it would be fruitless, because it is impossible to predict in advance what changes in duties might give rise to retaliation claims. Employers would have to treat Title VII plaintiffs and witnesses with kid gloves, sacrificing flexibility to change work assignments to meet operating needs. Such employees would have a trump card that would allow them to slack off with impunity, or to assert job rights that do not exist under their governing labor agreements. Pet. 19-21; AAR Br. 15, 18-19; EEAC Br. 11-12, 15. That is an untenable state of affairs, and this Court should intervene to restore rationality and clarity to Title VII law.

6. This Court should also review the punitive damages rulings of the court below. This Court's consideration of the question of the standard of proof for punitive damages would not be materially enhanced by further treatment in the lower courts. This issue of judicial procedure is straightforward; five circuits have now spoken on one side of the issue; and

Judge Sutton's opinion for the five dissenters below (which respondent concedes is "scholarly and provocative," Opp. 28) presents a cogent and comprehensive exegesis of the case for adopting the modern clear-and-convincing-evidence standard. When the statute is silent, Congress is deemed to delegate specification of that standard to the judiciary; *Woodby* v. *INS*, 385 U.S. 276, 284 (1966), and this Court should adopt the modern rule both now and at the time of the 1991 Act.[8]

Finally, respondents cannot reconcile the decision below with *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and *Hardin* v. *Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000). Those cases hold that when an issue of compensatory or punitive damages is "interwoven with that of liability," there can be no retrial on damages alone. 283 U.S. at 500. Respondent attacks a strawman in arguing that those cases do not say "a separate trial on punitive damages is never permissible." Opp. 29. But here the second jury would have to decide the same facts already decided by the first jury, and thus *Gasoline Products* and *Hardin* are directly on point. Pet. 25-27. The fact that BNSF can move for summary judgment on remand does not counsel against review; that is true whenever a court of appeals grants a new trial under a new legal standard. This Court's review of each of the Title VII and punitive damages questions is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] As respondent concedes, Congress has explicitly chosen the clear-and-convincing standard in federal punitive damages statutes passed *after* the 1991 Civil Rights Act. *See* Opp. 28 n.32. The inference to draw is not (as respondent claims) that Congress wishes to grant a lesser degree of protection to Title VII defendants. Rather, these statutes show that Congress recognizes the need for clear and convincing evidence before punitive damages are awarded, but now must select that standard explicitly given the erroneous case law presuming from statutory silence that Congress intended a preponderance-of-the-evidence standard.

Respectfully submitted,

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No. 05-259

Supreme Court, U.S.
FILED
JAN 26 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 05-259 Petition For A Writ Of Certiorari at the following pages.

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TENNESSEE WESTERN DISTRICT COURT

2:99-CV-02733

SHEILA WHITE,

Plaintiff,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/20/1999	1	COMPLAINT Receipt #: 049701; Filing fee $ 150.00 ; Complaint based on Sexual Discrimination and Retaliation (YDS) (Entered: 08/23/1999)
		* * * *
08/28/2000	55	ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT by Judge Jon P. McCalla denying motion for summary judgment [36-1]; the pla has presented sufficient evidence to create a genuine issue of material fact as to whether dft undertook the employment action for legitimate, nondiscriminatory reasons or the reason proffered by dft are merely pretextual. Since there is a genuine issue of material fact, the Court FINDS that summary jgm on this point is inappropriate. Pla also claims that dft retaliated against her by wrongfully suspending her for insubordination . . . pla has shown a genuine issue

DATE	NO.	PROCEEDINGS
		of material fact on this point. Dft's Motion for Summary Judgment is DENIED. (cc: all counsel) (YDS) (Entered: 08/28/2000)
		* * * *
08/29/2000	60	MINUTES: Jury trial held 8/29/00; Day 1; voir dire by the Court/Counsel: 6 challenges exercised, 6 jurors excused for cause, 16 jurors unused, panel of 8 jurors selected/ administered impanelment oath Presiding Judge: McCalla PLA Atty: Don Donati/ Wm Ryan DFT Atty: Everett Gibson/Ralph Gibson C/R: Brenda Parker (YDS) (Entered: 08/31/2000)
08/30/2000	61	MINUTES:Civil Jury Trial Minutes; Day 2; panel of 8 jurors administered impanelment oath; court's preliminary jury instructions (9:35am); opening statements; pla's proof: witnesses sworn/exhibits admitted; pla - 11:30am; dft - 12:00pm; Shelia White (2:10pm); exhibits 1,2,3 Presiding Judge: McCalla PLA Atty: Don Donati/Wm Ryan DFT Atty: Ralph Gibson/Everett Gibson C/R: Brenda Parker (YDS) (Entered: 9/01/2000)
		* * * *
08/31/2000	64	MINUTES:Civil Jury Trial Minutes; Day 3; pla's proof: Shelia White (9:50am), Dr. Anise Golden (11:35am), Monica Lee (1:45pm), Margretha Franklin (2:00pm), Eddie Spears by deposition (2:40pm), pla rests @ 3:10pm; motion for jgm as a matter of law – Denied; dft's proof: Billy Ray

DATE	NO.	PROCEEDINGS
		Joyner (4:00pm) Presiding Judge: McCalla PLA Atty: Don Donati/Wm Ryan DFT Atty: Everett Gibson/Ralph Gibson C/R: Brenda Parker (YDS) (Entered: 09/01/2000)
09/01/2000	65	MINUTES: Civil Jury Trial Minutes; Day 4; dft's proof: witnesses sworn/exhibits admitted - Percy Sharkey, Marvin J. Brown, Dr. Ashok Rao – via deposition, Kathy B. McGee; dft rests; rebuttal proof: Ralph Ellis; charge conference; pla's motion for jgm as matter of law – Denied; dft's motion for jgm as matter of law – Denied; Presiding Judge: McCalla PLA Atty: Don Donati/ William Ryan DFT Atty: Everett Gibson/ Ralph Gibson C/R: Brenda Parker (YDS) (Entered: 09/06/2000)
		* * * *
09/05/2000	68	MINUTES: Civil Jury Trial; Day 5; preliminary matters re: amendments/changes to proposed jury instructions/verdict form; closing arguments; jury charge; deliberations began @ 2:04pm; hostile work environment claim - Denied; retaliation claim – Granted; claim for overtime pay – Denied; $3,250.00 awarded for medical expenses; $40,000 awarded for pain and suffering; jury polled; verdict announced @ 5:05pm; court excused/discharged jury on 9/5/00 @ 5:10p; pla will move for payment of fees and costs Presiding Judge: McCalla PLA Atty: Don Donati/Wm Ryan DFT Atty: Everett Gibson C/R: Brenda Parker (YDS) (Entered: 09/07/2000)

DATE	NO.	PROCEEDINGS
09/05/2000	69	VERDICT for plaintiff Shelia White against defendant Burlington Northern on retaliation claim (YDS) (Entered: 09/07/2000)
		* * * *
09/06/2000	70	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla . . . in accordance with the jury verdict. Re [69-1], rendered on 9/5/00, jgm is hereby entered for pla Shelia White and against dft for the sum of forty-three thousand two-hundred and fifty dollars ($43,250.00) terminating case (cc: all counsel) (YDS) (Entered: 09/07/2000)
		* * * *
11/16/2000	83	ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR NEW TRIAL.. by Judge Jon P. McCalla ... Dft's motion is DENIED in its entirety. The verdict rendered by the jury stands. [72-1] (cc: all counsel) (EHG) (Entered: 11/16/2000)
11/16/2000	84	ORDER GRANTING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES, COSTS & EXPENSEES... by Judge John P. McCalla ...the Courts awards plaintiff 80% of the $67,856.25 lodestar amount, or $54,285.00. ..[76-1] (cc: all counsel) (EHG) (Entered: 11/16/2000)
11/16/2000	85	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [84-1] ..Pla is awarded $54,285.00 in attorney's fees, costs, and expenses. (cc: all counsel) (EHG) (Entered: 11/16/2000)

DATE	NO.	PROCEEDINGS
		* * * *
12/15/2000	88	ORDER GRANTING PLAINTIFF'S MOTION TO ALTER OR AMEND THE COURT'S ORDER AWARDING ATTORNEY FEES, COSTS, AND EXPENSES... by Judge Jon P. McCalla ..Since the Court has already awarded to Plaintiff $54,285.00 in attorney's fees, the total amount awarded to Plaintiff is $58,340.28. [85-1] [86-1] (cc: all counsel) (EHG) (Entered: 12/18/2000)
12/15/2000	89	AMENDED JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [85-1], re [88-1] (cc: all counsel) (EHG) (Entered: 12/18/2000)
		* * * *
12/15/2000	91	NOTICE OF APPEAL by defendant Burlington Northern from Dist. Court decision, [83-1] (EHG) (Entered: 12/18/2000)
12/21/2000	92	NOTICE OF APPEAL by defendant Burlington Northern from Dist. Court decision, [88-1] [89-1] [83-1] [84-1] [85-1] [70-1] (EHG) (Entered: 12/22/2000)
		* * * *
12/28/2000	95	PLAINTIFF'S NOTICE OF CROSS APPEAL by plaintiff Shelia White from Dist. Court decision [89-1] (EHG) (Entered: 01/03/2001)
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

00-6780
01-5024

SHEILA WHITE,
Plaintiff-Appellee Cross-Appellant,
v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,
Defendant-Appellant Cross-Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/28/00	Civil Case Docketed. Notice filed by Appellant Burlington Northern. Transcript needed: y (pje) [00-6780]
	* * * *
4/26/01	BRIEF filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 1. Certificate of Service date 4/23/01. Number of Pages: 40. [00-6780, 01-5024] (pje) [00-6780, 01-5024]
	* * * *
5/25/01	PROOF BRIEF filed by Donald A. Donati and William B. Ryan for Appellee Cross-Appellant Sheila White. Copies: 1. Certificate of Service date 5/22/01. Number of Pages: 79. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
6/28/01	PROOF BRIEF filed by Ralph T. Gibson for Appellant Cross Appellee Bur ington Northern. Certificate of service date 6/22/01. Number of Pages: 43. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *
7/9/01	FOURTH PROOF BRIEF filed by Donald A. Donati and William B. Ryan for Appellee Cross-Appellant Sheila White. Certificate of service date 7/6/01. Number of Pages: 28. Final fourth brief due 8/3/01. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *
7/16/01	APPENDIX filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 25. Certificate of service date 7/13/01 [00-6780, 01-5024] (lak) [00-6780 01-5024]
	* * * *
9/11/02	CAUSE ARGUED on 9/11/02 by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern in 00-6780/01-5024. William B. Ryan for Appellee Cross-Appellant Sheila White in 00-6780/01-5024. before Judges Krupansky. Clay. Gwin. [00-6780, 01-5024] (me) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
11/13/02	OPINION filed: REVERSED and remanded to set aside the jury verdict, decision for publication pursuant to local rule 206 [00-6780, 01-5024]. Robert B. Krupansky, Eric L. Clay, Circuit Judges, James S. Gwin, Authoring Judge. Clay J. delivered a separate dissenting opinion. (yh) [00-6780 01-5024]
11/26/02	PETITION for en banc rehearing filed by Donald A. Donati and William B. Ryan for Appellee Cross-Appellant Sheila White . Certificate of service date 11/25/02. [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *
1/3/03	RESPONSE to a petition for en banc rehearing [2654369-1] previously filed by Donald A. Donati and William B. Ryan. Response filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Certificate of service date 1/2/03. [00-6780, 01-5024] (blh) [00-6780 01-5024]
2/11/03	ORDER filed granting petition for an banc rehearing [2654369-1] filed by Donald A. Donati and William B. Ryan to reinstate appeal. The previous decision and judgment of this court is vacated, the mandate is stayed. [00-6780, 01-5024] Boyce F. Martin, Chief Judge; Danny J. Boggs, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, John M. Rogers, Circuit Judges. (blh) [00-6780 01-5024]

DATE	PROCEEDINGS
	* * * *
3/13/03	Supplemental brief filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 26. Certificate of service date 3/12/03. Number of Pages: 40. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *
4/16/03	Supplemental brief filed by Donald A. Donati , William B. Ryan for Appellee Cross-Appellant Sheila White on 00-6780, 01-5024 . Copies: 25. Certificate of service date 4/14/03 . Number of Pages: 35. [00-6780, 01-5024] (lak) [00-6780 01-5024]
4/23/03	BRIEF filed by Ralph Lamar for Amicus Curiae Natl Employ Lawyers. Copies 25. Certificate of service date 4/21/03 . Number of Pages: 18. [00-6780, 01-5024] (lak) [00-6780 01-5024]
	* * * *
5/27/03	REPLY BRIEF to supplemental brief from Appellee Cross-Appellant filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 25. Certificate of service date 5/6/03. Number of Pages: 14. [00-6780, 01-5024] [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
6/11/03	CAUSE REARGUED EN BANC by Bryan P. Neal for Appellant Cross-Appellee Burlington Northern in 00-6780/01-5024, William B. Ryan for Appellee Cross-Appellant Sheila White in 00-6780/01-5024, before Judge Martin, Krupansky, Boggs, Batchelder, Daughtrey, Moore, Cole, Clay, Gilman, Gibbons, Rogers, Sutton, Cook. [00-6780, 01-5024] (mc) [00-6780 01-5024]
	* * * *
4/14/04	OPINION filed: The district court's denial of defendant Burlington Northern & Santa Fe Railway's motion for judgment as a matter of law and the district court's award of attorney's fees to plaintiff Sheila White is AFFIRMED. The case is REMANDED for further proceedings as to punitive damages consistent with the opinion of this court, decision for publication pursuant to local rule 206 [00-6780, 01-5024]. Danny J. Boggs, Chief Judge, Boyce F. Martin, Robert B. Krupansky, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, John M. Rogers, Jeffrey S. Sutton, and Deborah L. Cook, Circuit Judges. GIBBONS, J., announced the judgment and majority opinion of the en banc court on all issues. The entire en banc court joined Parts I (Background) and III (Attorney's Fees) of the majority opinion. Part II (Adverse Employment Action) of the majority opinion was joined by Boggs, C.J., and Krupansky, Batchelder, Gilman, Rogers, Sutton, and Cook, JJ., and Part IV (Punitive Damages) was joined

DATE	PROCEEDINGS
	by Martin, Daughtrey, Moore, Cole, Clay, Gilman, and Cook, JJ. Clay, J. (pp. 36-51), filed a separate concurring opinion joining Parts I, III, and IV of the majority opinion and writing separately as to Parts II and V, in which he joined by Martin, Daughtrey, Moore, and Cole, JJ. Sutton, J. (pp. 52-85), filed an opinion concurring in Parts I-III and dissenting Parts IV and V, in which he was joined by Boggs, C.J., and Krupansky, Batchelder, and Rogers, JJ. (pjc) [00-6780 01-5024]
4/14/04	JUDGMENT : AFFIRMED, : REMANDED . (pje) [00-6780 01-5024]
	* * * *
4/28/04	ADDITIONAL PETITION for en banc rehearing from en banc determination or alternatively motion to clarify opinion dated 04-14/04 filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Certificate of service date 4/27/04. [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *
5/3/04	TENDERED : response to petition for rehearing from en banc determination or alternatively motion to clarify opinion of 4/14/04 from William B. Ryan for Appellee Cross-Appellant Sheila White. [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
4/26/05	ORDER. The petition for rehearing and the motion to clarify opinion are denied. The motion to stay the mandate is granted, and the motion to issue the mandate is denied. The mandate will issue after 90 days from the entry of this order if no petition for certiorari is filed. Decision not for publication. [00-6780, 01-5024] Danny J. Boggs, Chief Circuit Judge; Boyce F. Martin, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, John M. Rogers, Jeffrey S. Sutton, Deborah L. Cook, Circuit Judges. (blh) [00-6780 01-5024]

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

[Filed Aug. 20, 1999]

Civil Action No. 99 2733 MI BRE

SHEILA WHITE,

Plaintiff.

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

COMPLAINT

I.

Introduction

COMES NOW Plaintiff, SHEILA WHITE, and brings this action against Defendant, THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY. As more specifically set forth below, Plaintiff asserts that she has been subjected to unlawful intentional discrimination on the basis of sex in violation of § 703 of Title VII of the Civil Rights Act of 1964, as amended and presently codified at 42 U.S.C. § 2000e-2(a)(1), and unlawful retaliation in violation of § 704 of Title VII of the Civil Rights Act of 1964, as amended and presently codified at 42 U.S.C. § 2000e-3.

II.

The Parties

1. Plaintiff, Sheila White, is a female citizen of the United States and of the State of Tennessee, residing at all relevant times at 3942 Maynard Drive, Memphis, Tennessee 38109.

2. Defendant, The Burlington Northern and Santa Fe Railway Company, is a corporation duly licensed and authorized to do business in the State of Tennessee, and operates a business facility located at 5280 E. Shelby Dr., Memphis, Tennessee 38118.

3. At all relevant times herein, Defendant has continuously had more than twenty (20) employees in each of twenty (20) calendar weeks in the preceding calendar year within the meaning of 42 U.S.C. § 2000e(b).

III.

Jurisdiction

4. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e(5)(f)(3).

5. Plaintiff timely filed charges of discrimination with the Equal Employment Opportunity Commission alleging violations of Title VII by Defendant. Plaintiff has received Notices of Right to Sue which are attached herewith as "Exhibit A". All conditions precedent to the institution of this lawsuit have been fulfilled.

IV.

Statement of Facts

6. Plaintiff was hired by Defendant on or about June 23, 1997. Plaintiff was hired as a forklift driver to work in the maintenance of way department. At the time she was hired, Plaintiff had five (5) years of forklift operation experience.

7. On Plaintiff's first day of work she reported to Bill Joiner, who was to be Plaintiff's foreman. In front of at least four (4) male co-workers, Joiner proceeded to tell Plaintiff that if she came on her period or had any female difficulties he would make her job easier or lighter. Plaintiff was the only woman who worked in the maintenance of way department.

8. Thereafter, on an almost daily basis, Joiner repeatedly berated Plaintiff telling her that she should find another job because the railroad was not the place for women to work.

9. Before Plaintiff had completed her probationary period she was told by Joiner that the Roadmaster, Marvin Brown, wanted to disqualify her before she made her probation.

10. On one occasion in 1997, after a train had derailed at night in the company yard, Plaintiff was called to the scene of the derailment. When Joiner arrived at the scene, he told Plaintiff to shine her flashlight on him so he could see while he was urinating.

11. Joiner did not treat Plaintiff in the same equal manner as he treated men working for Defendant. For example, Joiner refused to give Plaintiff a raincoat to be used when she worked outside. While Joiner bought men new raincoats, Mr. Joiner told Plaintiff that he didn't see why she needed a raincoat.

12. Joiner gave Plaintiff a hard time whenever Plaintiff needed to take a restroom break. Joiner did not want to give Plaintiff a restroom break because it required him to make special stop for Plaintiff. Joiner did not give the men a hard time about taking restroom breaks.

13. When overtime work was available, Joiner would call the other men on Plaintiff's gang for overtime; however, Joiner would not call Plaintiff to work overtime.

14. Joiner told Plaintiff that she would need to provide him with a doctor's statement if she missed work. Joiner did not require the men to give a doctor's statement when they missed work. Plaintiff spoke out about this to Levert Deans, a foreman. Deans told Plaintiff that Roadmaster Brown and the Assistant Roadmaster, Mike Porter, made her give a doctor's statement because they considered her to be a troublemaker.

15. In September, 1997, Plaintiff reported to the Roadmaster, Marvin Brown, that she felt that Joiner was discriminating against her because she was a woman. Upon information and belief, Defendant investigated Plaintiff's allegations and suspended Bill Joiner for ten (10) days.

16. After Plaintiff reported her complaints against Joiner to the Roadmaster Brown, Brown told Plaintiff she would no longer be working as a forklift driver. Brown then demoted Plaintiff to the position of trackman. The work as a trackman was heavy, dirty, outside work, and is a lower position than a forklift driver. Defendant demoted Plaintiff to this position in retaliation for her complaints.

17. When Bill Joiner came back from his suspension Plaintiff was placed under Joiner's supervision.

18. On October 10, 1997, Plaintiff filed a Charge of Discrimination (Charge # 250980041) with the EEOC alleging sexual discrimination and retaliation. After Plaintiff filed her charge with the EEOC, Joiner was sent to Marion, Arkansas to work.

19. After Joiner left, Plaintiff's new foreman was Percy Sharkey. While working under Sharkey, Plaintiff was constantly being nagged by Sharkey. Sharkey told Plaintiff that if she could not handle the work she should just quit or go home.

20. On December 4, 1997, Plaintiff filed a second Charge of Discrimination (Charge # 250980247) with the EEOC alleging that she continued to be discriminated against on the basis of her sex and in retaliation for filing the prior charge of sex discrimination against Defendant.

21. In the late fall of 1997, Sharkey told Plaintiff that she would have to go to Blytheville, Arkansas to work. When Plaintiff questioned Sharkey as to the reason she was being sent to Blytheville, Sharkey told Plaintiff that they are trying

to get rid of you because you are a troublemaker. Sharkey then told Plaintiff that he was just doing what he had been told to do.

22. While working in Blytheville, Plaintiff performed her job in a professional and competent manner. Without any basis in fact, Plaintiff was told by Sharkey that she was being sent home to Memphis for insubordination. Roadmaster Brown placed Plaintiff on suspension on or about December 11, 1997.

23. On December 15, 1997, Plaintiff filed a third Charge of Discrimination (Charge # 250980288) with the EEOC alleging she had been suspended because of her sex and in retaliation for filing previous charges.

24. Plaintiff was off work for approximately three (3) months while her Union was investigating her suspension. Plaintiff then received a call from Brown and Brown asked Plaintiff how soon could she get back to work. Plaintiff resumed working in January, 1998.

25. Plaintiff resumed working as a trackman under Percy Sharkey.

26. As a result of the repeated and constant beratement by Brown and Sharkey, Plaintiff went to see Annice Golden, a clinical psychologist, in February, 1998. Accordingly, Plaintiff went out on sick leave.

27. Plaintiff stayed on sick leave through December, 1998. At that time, Plaintiff was notified that she was being fired for failing to provide Defendant with a leave of absence report.

28. On April 21, 1999, Plaintiff filed another Charge of Discrimination (Charge # 250990827) with the EEOC alleging she had been fired for filing her previous charges.

29. As a result of Defendants' discrimination and retaliation against Plaintiff, Plaintiff has suffered severe injury including, but not limited to, loss of income and benefits. In

addition, Plaintiff has suffered emotional distress, embarrassment, mental anguish, loss of enjoyment of life, insomnia, humiliation and other non-pecuniary losses.

30. Defendant's action and inactions resulted in discrimination against Plaintiff on the basis of her sex in violation of Title VII. The effect of Defendant's employment policies and practices was to discriminate against Plaintiff in way that jeopardized her job and deprived her of equal employment opportunities. Defendants action and inactions created a hostile work environment resulting in discrimination against plaintiff on the basis of sex in violation of Title VII. Further, Defendant's action and inactions constituted retaliation against Plaintiff in violation of Title VII.

31. The unlawful actions of Defendant complained of above were willful, malicious and with complete and reckless disregard for Plaintiff's rights under the law. In addition, Defendant failed to act in good faith when it investigated Plaintiff's complaints. As such, punitive damages are appropriate.

V.

Cause of Action

32. Plaintiff incorporates paragraphs 1 through 31 above as though specifically set forth herein, and for cause of action states as follows:

33. Defendant's termination of Plaintiff's employment with Defendant constitutes unlawful discrimination on the basis of sex in violation of § 703 of the Civil Rights Act of 1964, as amended and codified at 42 U.S.C. § 2000e-2(a)(1). More specifically, 1) Plaintiff was treated differently than male co-workers who were similarly situated; and 2) Defendant's actions created a hostile work environment which was sufficiently severe and pervasive to alter the conditions of Plaintiff's employment and created an abusive working environment.

34. Defendant's termination of Plaintiff's employment with Defendant constitutes unlawful retaliation in violation of § 704 of the Civil Rights Act of 1964, as amended and codified.

VI.

Prayer for Relief

WHEREFORE, premises considered, Plaintiff respectfully prays that the Court cause service to issue in this case and set this matter for trial. Upon a verdict thereon, Plaintiff prays the Court grant the following relief:

1. An award of backpay, lost benefits, front pay, and other equitable relief;

2. An award of compensatory and punitive damages in the amount of $300,000.00 for sex discrimination in violation of Title VII;

3. An award of compensatory and punitive damages in the amount of $300,000.00 for sex discrimination in violation of Title VII;

4. Prejudgment and post-judgment interest at the legal rate as determined by the Court;

5. An award of all costs, disbursements, reasonable attorney's fees, and expert witness fees;

6. Such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

DONATI LAW FIRM, LLP

By: /s/ Donald A. Donati
Donald A. Donati
Reva M. Kriegel
Attorneys for Plaintiff
1545 Union Ave.
Memphis, TN 38104
901/278-1004

NOTICE OF RIGHT TO SUE

(Conciliation Failure)

To:	From:
Sheila White	EQUAL EMPLOYMENT
3942 MAYNARD DRIVE	OPP. COMM.
MEMPHIS, TN 38109	Memphis District Office
	1407 Union Ave. Suite 621
	Memphis, TN 38104

□ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250980041	Celia Liner, Sr. Tr. Atty	(901) 544-0075

TO THE PERSON AGGRIEVED:

This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit

must be filed WITHIN 90 DAYS from your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ W.S. Grabon, JUL 14 1999
W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 E SHELBY DR
MEMPHIS, TN 38118

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Sheila White	E.E.O.C.
3942 MAYNARD DRIVE	Memphis District Office
MEMPHIS, TN 38109	1407 Union Ave. Suite 621
	Memphis, TN 38104

☐ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250980247	Karen Booker	(901) 544-0154

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ We cannot investigate your charge because it was not filed within the time limit required by law.

☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You had 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude

that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)* _____

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

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On Behalf of the Commission

/s/ W.S. Grabon, MAY 24 1999
W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 EAST SHELBY DRIVE
MEMPHIS, TN 38118

NOTICE OF RIGHT TO SUE

(Conciliation Failure)

To:	From:
Sheila White	EQUAL EMPLOYMENT
3942 MAYNARD DRIVE	OPP. COMM.
MEMPHIS, TN 38109-0000	Memphis District Office
	1407 Union Ave. Suite 621
	Memphis, TN 38104

□ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250980288	Celia Liner, Sr. Tr. Atty	(901) 544-0075

TO THE PERSON AGGRIEVED:

This Notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

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If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ W.S. Grabon, JUL 14 1999
W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 E. SHELBY DRIVE
MEMPHIS, TN 38118-0000

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Sheila White	E.E.O.C.
3942 MAYNARD DRIVE	Memphis District Office
MEMPHIS, TN 38109	1407 Union Ave. Suite 621
	Memphis, TN 38104

☐ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250990827	Karen Booker	(901) 544-0154

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ We cannot investigate your charge because it was not filed within the time limit required by law.

☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You had 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude

that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)* _____

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ W.S. Grabon, MAY 24 1999

W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 E SHELBY DR
MEMPHIS, TN 38118

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

Civil Action No. 99-2733 MI/Bre

SHEILA WHITE,

Plaintiff,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

ADDENDUM TO COMPLAINT

Pursuant to past experience with the Court, Plaintiff's counsel hereby submits an addendum to Plaintiff's Complaint and attached the following Charges of Discrimination filed with the EEOC:

Charge No. 250980041

Charge No. 250980247

Charge No. 250980288

Charge No. 250990827

RESPECTFULLY SUBMITTED,
DONATI LAW FIRM, LLP

By: /s/ Donald A. Donati
Donald A. Donati
Reva M. Kriegel
1545 Union Ave.
Memphis, TN 38104
901/278-10004
Attorneys for Plaintiff

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 250980041

Tennessee Human Rights Commission and EEOC
State or local Agency, if any

NAME (indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include Area Code): (901) 758-6558

STREET ADDRESS: 1992 Maynard Drive, Memphis, TN 38109

CITY, STATE AND ZIP CODE:

DATE OF BIRTH: 11/15/56

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: Burlington Northern Railroad

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6125

STREET ADDRESS: 5290 E Shelby Dr. Memphis, TN 38118

CITY, STATE AND ZIP CODE:

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS:

CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 07/02/97
LATEST: 09/29/97
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s))

On September 16, 1997, I reported my Foreman for sexual harassment. On September 26, 1997, I was advised that the alleged harasser had been suspended without pay for ten (10) days, as a result of the company's investigation. I was also advised that my position, Forklift Operator, was being phased out and/or placed up for bids, as of September 29, 1997. On September 29, 1997, I was placed in the position of Trackman and another employee was placed in the position of Forklift Operator. Finally, I was informed that I would remain under the supervision of the alleged harasser. I have worked for the above-named company since June 23, 1997.

I believe that I have been discriminated against because of my sex (female) and in retaliation for reporting sexual harassment, in violation of Title VII of the Civil Rights Act of 1964, as amended.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (signature)

NOTARY (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila White

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)
10, October 1997

EEOC Form 5 (Rev. 04/97)

RESPONDENT'S COPY

BEST AVAILABLE COPY

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 250980247

Tennessee Human Rights Commission
State or local Agency, if any

and EEOC

NAME (Indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include Area Code): (901) 798-6558

STREET ADDRESS: 1942 Maynard Drive, Memphis, TN 38109

CITY, STATE AND ZIP CODE:

DATE OF BIRTH: 11/15/56

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: Burlington Northern Railroad

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6166

STREET ADDRESS: 5250 East Shelby Drive, Memphis, TN 38118

CITY, STATE AND ZIP CODE:

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS:

CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es)):

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 07/02/97
LATEST: 12/04/97
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I am being subjected to unequal terms and conditions of employment with respect to restrooms, supervision and constant surveillance. I was drafted for an undesirable job assignment. I am classified as a Trackperson and have been employed since June, 1997.

I believe I am being discriminated against because of my sex (female) and in retaliation for filing a prior charge of discrimination (250980041) against my employer. I believe I am being dsicriminated against because of my sex because there are no female restroom facilities in my work area and the employer has refused to make any available. I am being retaliated by being required to obtain approval from the Roadmaster prior to taking a day off. The Roadmaster keeps me under surviellance by calling my foreman daily to see if I am present and to check on my activities. No other employee is being subject to similar terms and conditions of employment. Additionally, I was involuntarily selected for a job assignment in Blytheville, Ark., over less senior employees.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (Signature)

NOTARY (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila White

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Month, day, and year): 4th December, 1997 Earl Cox

EEOC Form 5 (Rev. 06/94)

CHARGING PARTY COPY

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: [ ] FEPA [X] EEOC

CHARGE NUMBER: 250980288

Tennessee Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include area code): (901) 758-6558

STREET ADDRESS: 3942 Maynard Drive, Memphis, TN 38109

CITY, STATE AND ZIP CODE:

DATE OF BIRTH: 11/15/56

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: Burlington Northern Railroad

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6125

STREET ADDRESS: 5280 E. Shelby Drive, Memphis, TN 38118

CITY, STATE AND ZIP CODE:

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS:

CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[X] RETALIATION [ ] AGE [ ] DISABILITY [ ] OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 12/11/97
LATEST: 12/11/97
[ ] CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s).)

On December 11, 1997, I was put on suspension pending an investigation. I hold the position of Trackman/Trackperson. I have been employed with the above named employer since June 23, 1997.

The reason given for the suspension was that I was insubordinate.

I believe I was put on suspension because of my sex, female and in retaliation for filing a previous charge of discrimination (250-98-0041), in violation of Title VII of the Civil Rights Act of 1964, as amended.

[ ] I want this charge filed with both the EEOC and the State or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (Signature):

NOTARY (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila White 12-12-97

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year): 12/12/97

EEOC Form 5 (Rev. 06/92)

28

CHARGING PARTY COPY

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 250990827

Tennessee Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include Area Code): (901) 786-9141

STREET ADDRESS, CITY, STATE AND ZIP CODE: 3942 Maynard Drive, Memphis, TN 38109

DATE OF BIRTH: 11/15/1956

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: BURLINGTON NORTHERN RAILROAD

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6118

STREET ADDRESS, CITY, STATE AND ZIP CODE: 5401 E SHELBY DR, Memphis, TN 38118

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS, CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 09/29/1997
LATEST: 12/07/1998
☐ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s).)

I was discharged from the position of Trackperson on December 7, 1998. I had worked for the above-named company since June 23, 1997.

I was advised that I was being discharged for failing to request an extension of my original Leave of Absence which ended September 30,1998.

I believe that I have been discriminated against because of my sex (female) and in retaliation for reporting sexual harassment in September of 1997 and in retaliation for filing EEOC charges 250-98-0041, 250-98-0247 & 250-98-0288.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (Signature):

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila D. White

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year): 21 April 1999 Karen Parker

EEOC Form 5 (Rev. 06/82)

CHARGING PARTY COPY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

[Filed Aug. 25, 2000]

Civil Action No. 99 2733 Ml Bre

SHEILA WHITE,

Plaintiff,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

JOINT PRETRIAL ORDER

Come now the parties and submit the following joint pre-trial order in this action.

Appearances for the Parties:

For Plaintiff:

Donald A. Donati
William B. Ryan
Donati Law Firm, LLP
1545 Union Avenue
Memphis, Tennessee 38104
901/278-1004

For Defendant:

Everett B. Gibson
Ralph T. Gibson
Bateman, Gibson & Childers, LLC
65 Union Avenue, Suite 1010
Memphis, TN 38103
901/843-2466

I. Jurisdiction

The parties stipulate to the jurisdiction of this Court.

II. Pending Motions

A motion summary judgment and a motion in limine have been filed by Defendant.

III. Contention of the Parties

A. Plaintiff's Contentions

Plaintiff contends that she was discriminated against by the Defendant because of her sex in violation of Title VII. Plaintiff further contends that after she opposed this discrimination she was retaliated against by Defendant, in violation of Title VII, when she was transferred and suspended.

Defendant is a corporation which operates railway transportation company. Plaintiff began her employment with Defendant on June 23, 1997. Plaintiff worked at the Tennessee Yard under Roadmaster Marvin Brown. Plaintiff previously worked at Schering Plough where she had gained forklift operation experience. Plaintiff's job title upon her hiring was that of track laborer. However, Plaintiff did not perform the duties of track laborer until she complained about sexual discrimination and sexual harassment. Instead, Plaintiff was initially assigned by Roadmaster Marvin Brown to operate a forklift and clean up around the material complex.

From June 23, 1997 to October 9, 1997, Plaintiff worked under the supervision of Bill Joiner. Bill Joiner held the belief that women should not work on the railroad. Joiner treated Plaintiff differently because she was a woman including denying her overtime. Joiner made lewd comments and acted inappropriately towards Plaintiff. Joiner and other male employees stated to Plaintiff that women should not work at the rail yard. There existed at the railroad a heavy anti-women animus.

Plaintiff complained to Defendant about sexual discrimination and sexual harassment on September 16, 1997. Defendant conducted an investigation concerning Plaintiff's allegation on September 22-23, 1997. Defendant found that Bill Joiner had behaved inappropriately and subsequently suspended Joiner for ten days without pay. Defendant also required him to attend EEO training. On September 26, 1997, Roadmaster Brown removed Plaintiff from the forklift position in retaliation for complaining about discrimination.

Plaintiff continued to work under Bill Joiner until October 9, 1997. Joiner then transferred to Marion, Arkansas. Plaintiff filed her first charge of sex discrimination and retaliation with the EEOC on October 10, 1997. Percy Sharkey then became Plaintiff's foreman. On December 4, 1997, Plaintiff filed a second charge of discrimination with the EEOC alleging sex discrimination and retaliation. On December 11, 1997, Plaintiff was working in Blytheville, Arkansas under her foreman Percy Sharkey. On that date Plaintiff was suspended for insubordination. Roadmaster Marvin Brown made the decision to suspend Plaintiff without pay on December 11, 1997. Plaintiff filed a third charge of discrimination and retaliation with the EEOC on December 15, 1997. Subsequently a hearing was held pursuant to the collective bargaining agreement. Plaintiff was found not to have been insubordinate and Plaintiff was reinstated to her position on or about January 16, 1998. Plaintiff was paid back pay that she lost as a result of her suspension. Plaintiff continued to work under Percy Sharkey until February 17, 1998 when she was placed on medical leave by D. Annice Golden, Ph.D., Plaintiff's psychologist because of depression caused by the action of the Defendant.

B. Defendant's Contentions

Plaintiff began working for BNSF as a maintenance of way track laborer on June 23, 1997. On October 10, 1997, plaintiff filed her first charge of discrimination against BNSF with the

EEOC. In her first charge of discrimination, plaintiff alleged that she had been sexually harassed by her foreman, Bill Joiner, that her position in the maintenance of way department had been changed from the position of forklift operator to another position in the maintenance of way department, and that she remained under the supervision of Mr. Joiner. According to plaintiff's own deposition, however, BNSF promptly and appropriately responded to plaintiff's complaints about Mr. Joiner by suspending him for 10 days without pay and by requiring Mr. Joiner to attend EEO training as directed by the BNSF Human Resources Department. Moreover, plaintiff remained a trackman, was not given a reduction in pay, and was only given a different job duty within the position of track person. Finally, plaintiff admitted that she had no more problems with Mr. Joiner after he returned from his suspension and that Mr. Joiner was transferred to a different gang in another city just a few days after he came back from his suspension.

Plaintiff has identified only two direct comments that were made to her by her male coworkers or supervisors while she was actively employed by BNSF that were improper. Her other allegations regarding the comments made concerning the general feeling about women on the railroad were not made directly to her. Accordingly, Plaintiff will be unable to establish the hostile work environment element of her claims.

Plaintiff's second charge of discrimination alleged that she was subjected to discrimination because there were no female restroom facilities for the maintenance of way department at the Tennessee Yard in Memphis, the roadmaster required plaintiff to seek approval from him personally before she could take a day off and checked up on her attendance on a daily basis, and the plaintiff was involuntarily selected for a job assignment in Blytheville, Arkansas, over less senior employees. The foregoing EEOC charge was filed by plaintiff on December 4, 1997, and plaintiff was suspended for insubordination on December 11, 1997.

BNSF made accommodations to the maintenance of way restroom facilities at the Tennessee Yard in Memphis; however, because plaintiff was suspended on December 11, 1997 and plaintiff never returned to work in the Tennessee Yard before her termination, plaintiff did not know what accommodations had been made to the restroom facilitates [sic]. Moreover, plaintiff admitted that her entire track gang was sent to Blytheville, Arkansas and that under the Collective Bargaining Agreement Blytheville, Arkansas, was part of her territory. Finally, plaintiff's absenteeism for the short duration she was actively employed at BNSF gave the roadmaster, Marvin Brown, cause for concern such that he monitored plaintiff's attendance. Mr. Brown testified in his deposition that any employee with the absenteeism problems plaintiff had were monitored in the same fashion.

Plaintiff's third charge of discrimination against BNSF was filed on December 15, 1997. In that charge, plaintiff claimed that BNSF's action in suspending plaintiff for insubordination was really in retaliation for the two previous charges that plaintiff had filed against defendant. The record, however, reflects that plaintiff's foreman at that time, Percy Sharkey, felt that plaintiff was being insubordinate for failing to follow instructions. Mr. Sharkey, who no longer works for BNSF, testified in his deposition that he felt plaintiff was being insubordinate, notwithstanding the fact that in the union investigation it was ultimately found that plaintiff should not have been suspended. In any event, plaintiff was returned to her position with all back pay, including any overtime she would have received.

IV. Stipulated Facts

The parties have agreed to stipulate to the following facts:

1. Defendant hired Plaintiff on June 23, 1997.

2. Plaintiff's job title was track laborer.

3. Plaintiff complained to Defendant about sexual discrimination and sexual harassment on September 16, 1997.

4. Bill Joiner was suspended without pay for ten days and required to attend EEO training.

5. Plaintiff filed a charge of discrimination with the EEOC on October 10, 1997.

6. Plaintiff filed a second charge of discrimination with the EEOC on December 4, 1997.

7. Defendant removed Plaintiff from service on December 11, 1997.

8. Defendant's stated reason for removing Plaintiff was insubordination.

9. Plaintiff did not receive pay while she was on suspension.

10. Plaintiff filed a third charge of discrimination and retaliation on December 15, 1997.

11. Plaintiff was reinstated to her position on or about January 16, 1998, and was given all back pay, including all overtime pay she might have received.

12. Plaintiff went on medical leave on February 17, 1998.

13. Parties agree to stipulate to the authenticity of all documents provided in discovery process, but reserve all other objections for trial.

V. Contested Issues of Fact

Whether Plaintiff was exposed to a hostile work environment based on sex in violation of Title VII.

Whether Defendant discriminated against Plaintiff in the terms and conditions of her employment based upon sex in violation of Title VII.

Whether Defendant retaliated against Plaintiff, in violation of Title VII, after she protested discrimination.

Whether Bill Joiner was Plaintiff's supervisor.

Whether the change in Plaintiff's job duties was an adverse employment decision.

Whether Defendant's articulated reasons for transferring Plaintiff and removing Plaintiff from service are pretextual.

If Plaintiff prevails on any of her claims, what equitable relief is Plaintiff entitled to receive?

If Plaintiff prevails on any of her claims, is Plaintiff entitled to receive compensatory damages. If yes, in what amount?

If Plaintiff prevails on her claims, is Plaintiff entitled to receive punitive damages? If yes, in what amount?

VI. Contested Issues of Law

Whether Plaintiff has established a *prima facie* case of sex discrimination.

Whether Plaintiff has established a *prima facie* case of retaliation.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

[Aug. 28, 2000]

No. 99-2733 Ml/Bre

SHEILA WHITE,

Plaintiff,

vs.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's Motion for Summary Judgment. For the reasons stated below, the Motion is DENIED.

Background

This claim arises under 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a), parts of legislation commonly referred to as "Title VII." Plaintiff Sheila White alleges that Defendant Burlington Northern and Santa Fe Railway Company ("BNSF") (1) discriminated against her through a hostile work environment and (2) retaliated against her after she complained to management about the alleged discrimination and filed complaints with the Equal Employment Opportunity Commission (the "EEOC").

Defendant hired Plaintiff on June 23, 1997 for the job position of "Track Laborer" with Gang 321 in the Main-

tenance of Way Department. Plaintiff was the only female member of Gang 321 at the time of hiring and throughout the time period involved in this case. The primary duties of this position related to the maintenance of the railroad track. However, because of prior forklift experience, Plaintiff began work as a forklift operator under Gang 321 Foreman Bill Joiner. Plaintiff operated a forklift and had the general task of keeping the material complex in a clean condition.

Over the course of the next three months, Plaintiff alleges certain instances of harassment and discrimination by Joiner. Specifically, Plaintiff alleges that:

(1) In an orientation meeting, Joiner stated to Plaintiff in front of male co-workers that she should let him know when she came on her period so that he could lighten her workload;

(2) On an almost daily basis, Joiner made comments to Plaintiff that the railroad is not a place for women to work;

(3) Joiner intentionally failed to offer overtime work to Plaintiff because she is female;

(4) While working on a job, Joiner requested that Plaintiff hold a flashlight on him while he urinated;

(5) Joiner failed to provide Plaintiff with a raincoat when raincoats were provided to her male co-workers; and

(6) Joiner required Plaintiff to provide a doctor's statement if she missed work, but he did not require doctor's statements from her male co-workers.

Plaintiff also alleges that Defendant discriminated against her by not providing adequate bathroom facilities. Specifically, Plaintiff alleges that the facilities made available to her were unisex, did not have functioning locks, and as a result, her co-workers often entered while she was inside the bathroom.

Plaintiff complained to Joiner's supervisor, Roadmaster Marvin Brown, about Joiner's conduct on September 16, 1997. After an investigation by Brown, Joiner was suspended for 10 days. Once Joiner returned from his suspension, he served as foreman over Plaintiff for approximately one to two weeks before accepting a transfer.

While Plaintiff does not allege any discriminatory or harassing conduct by Joiner after the suspension, she does allege that Brown changed her job duties from a forklift operator to the more physically demanding duties of a track laborer on September 20, 1997. In this new position, Plaintiff worked on the actual track maintenance and repair work. This change did not constitute an official change in job title, but did reflect a change of duties. Defendant alleges that this change was the result of terms under a collective bargaining agreement which required Defendant to place a more senior employee in the forklift operator position. Plaintiff contends that retaliation was the true intent behind the change.

Approximately two weeks later, on October 10, 1997, Plaintiff filed her first charge of discrimination with the EEOC. Her complaint alleged that (1) she had been subject to harassment from Joiner, (2) that the change in job duties from forklift operator to track laborer was taken in retaliation for complaining about the harassment, (3) that she remained under the supervision of Joiner, and (4) that she was not offered overtime work in the same manner as her male co-workers.

On the same day that Plaintiff filed her complaint with the EEOC and Joiner was transferred to a different location, Percy Sharkey became Foreman over Gang 321. While Plaintiff alleges that Sharkey "nagged her," she does not allege any specific instances of harassment or discrimination by Sharkey. She does allege, however, that around December 8, 1997, she was sent by Sharkey to Blytheville, Arkansas, ahead of the rest of her gang. Plaintiff alleges that this assignment was discriminatory.

Plaintiff filed a second charge of discrimination with the EEOC on December 4, 1997. In this charge, Plaintiff complained that (1) she was denied a raincoat while male co-workers were provided with raincoats, (2) failure by Defendant to provide adequate bathroom facilities constituted discrimination, (3) she was forced to personally report to the roadmaster for time off, while her male co-workers were not required to do so, and (4) that the assignment to Blytheville was discriminatory and taken in retaliation for complaining about discrimination and harassment.

On December 11, 1997, after her gang had joined her in Blytheville, Arkansas, Plaintiff was suspended for insubordination. Plaintiff alleges that Mr. Sharkey told her to ride with James Key, foreman of a gang with which Gang 321 was working, to a job site. When Plaintiff went to Key's truck, he informed her that he was taking a different worker with him and that she should ride with Sharkey. Plaintiff alleges that when she returned to the office to relay this information to Sharkey, he again told her to go with Key. By that point, Key had left and Plaintiff was forced to stay with Sharkey. Sharkey alleges that Plaintiff simply refused to follow his instructions. Sharkey further contends that he contacted Brown about this incident and that Brown told him to suspend Plaintiff for insubordination. Brown denies that he ordered the suspension and that Sharkey suspended Plaintiff on his own initiative. Plaintiff was immediately suspended for insubordination. After a hearing into the matter, Plaintiff's suspension was dismissed and she was reinstated in January 1998 with full back pay.

At some point during this time period, Defendant made repairs and accommodations to the bathroom facility. However, Plaintiff was not aware of these changes.

On December 15, 1997, Plaintiff filed her third complaint with the EEOC, alleging that the December 11, 1997 suspension was in retaliation for complaining about discrimination and harassment.

On February 17, 1998, Plaintiff went on Medical Leave which was twice extended. When a third request for extension of the medical leave was not made at the expiration of the second extension, Defendant terminated Plaintiff's employment in December 1998.

Plaintiff filed a fourth charge with the EEOC on April 21, 1999, alleging that her termination was in retaliation for her previous complaints.

The EEOC issued Right to Sue letters on Plaintiff's four claims on May 24, 1999 and July 14, 1999. Plaintiff filed suit in this court on August 20, 1999, within 90 days of the earliest Right to Sue letter.

Discussion

A. *Summary Judgment Standard*

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," *id.* at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. *See Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v.*

Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When confronted with a properly-supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246 (6th Cir. 1998). A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

B. *Hostile Work Environment*

Title VII states, in relevant part: "[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). A plaintiff may establish a violation of Title VII by proving that the discrimination based on sex created a hostile or abusive work environment. *See Williams v. General Motors Corp.*, 187 F.3d 553, 560 (6th Cir. 1999). To prove a prima facie case of a hostile work environment based on sex, a plaintiff must establish the following five elements: (1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on her gender; (4) the harassment created a hostile work environment; and (5) the existence of employer liability. *See, e.g., Williams* 187 F.3d at 560-561; *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999). A

hostile work environment plaintiff must also meet both a subjective and an objective test. "The conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993)); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998), 118 S.Ct. 2275, 2283 (1998).

The first three elements of a prima facie case of a hostile work environment are easily met. Plaintiff is a female and is therefore a member of a protected class under Title VII. Defendant has not presented any facts to suggest that the acts, if true, were invited by the Plaintiff, so the second element is also met. The acts in question, if true, appear to be directly related to Plaintiff's gender.

In determining whether the alleged acts were severe or pervasive enough to create a hostile work environment, a court must use a "totality of the circumstances" approach. *See Williams*, 187 F.3d at 562. In such an approach, the proper perspective is a holistic one—one in which the alleged events must be taken in sum and not disaggregated and which considers "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance." *Harris*, 510 U.S. at 23; *see also Williams*, 187 F.3d at 562-64.

The proper analysis, when taking the facts in the light most favorable to the Plaintiff, must then consider that the Plaintiff was subject to discussion of her period in front of male co-workers, daily reminders of her foreman's belief that she should not be in her present job position because she is a woman, a request that she shine a flashlight upon a man while he is urinating, bathroom facilities that did not adequately protect her expectation of privacy, provision of raincoats to

co-workers while refusal to provide her with one, and non-consideration for overtime work. The recurrent nature of two of these events, the almost daily remarks by Joiner and the continual lack of overtime work, strengthen the hostile characteristic of the environment. A reasonable jury could objectively decide that these events gave rise to a hostile work environment.

The subjective element of the analysis is met since Plaintiff has on several occasions complained about the acts and sought redress through the EEOC and now the Court, in addition to Plaintiff's statements through the pleadings and her deposition.

The last element of a prima facie case of a hostile work environment is employer liability. The appropriate standard for determining employer liability depends upon whether the alleged harasser is a co-worker or supervisor. If a supervisor is involved, then it is not enough for an employer to take corrective action; employers have an affirmative duty to prevent sexual harassment by supervisors. *See Williams* 187 F.3d at 561. The Sixth Circuit has stated that "a supervisor is 'an individual who serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment.'" *Summerville v. Ross/Abbott Lab.*, 187 F.3d 638, 1999 WL 623786 at **7 (6th Cir. (Ohio))[1], quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994). This definition is in the disjunctive—a "supervisor" need only perform one of these duties. In the present case, a genuine issue of fact exists as to whether Joiner was a supervisor over the Plaintiff, especially as to whether a BNSF foreman could fire a track laborer and

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[1] Although citation to unpublished Sixth Circuit precedents is disfavored, this case is referred to in the absence of clear published case law from this Circuit "because it establishes the law governing the present action and 'there is no [Sixth Circuit] published opinion that would serve as well.'" *Norton v. Parke*, 892 F.2d 476, 479 n.7 (6th Cir. 1989).

to what extent a foreman controlled the conditions of work encountered by a track laborer. Since there is a genuine issue of fact on this point, summary judgment is inappropriate.

If a foreman at BNSF is in fact a supervisor, then Plaintiff must show that Defendant failed to take preventive measures to ensure that the workplace was free of harassment and discrimination. The record only indicates that Defendant took corrective, not preventive, measures.

The Court FINDS that there exists genuine issues of material fact which render summary judgment inappropriate on the hostile work environment claim.

C. *Retaliation*

Title VII prohibits retaliation against an employee "because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing," in connection with an unlawful employment practice. *See* 42 U.S.C. §2000e-3(a). A prima facie retaliation claim is established by showing the following:

> (1) that plaintiff engaged in an activity protected by Title VII;
>
> (2) that the exercise of [the plaintiff's] civil rights was known by the defendant;
>
> (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and
>
> (4) that there was a causal connection between the protected activity and the adverse employment action.

See Williams 187 F.3d at 568. The facts set forth above establish that Plaintiff had filed claims under Title VII and was thus engaged in protected activity. The record also

establishes that both Brown and Sharkey knew of Plaintiff's exercise of her rights.—

The third element of the prima facie case of retaliation requires that the employment action taken by the Defendant be "adverse." The Sixth Circuit has stated that "[i]n order to establish the existence of an adverse employment action, a plaintiff must show that he or she 'has suffered a materially adverse change in the terms or conditions of employment because of the employer's actions.'" *Summerville* at **8, quoting *Allen v. Michigan Dept. of Corrections*, 165 F.3d 405, 410 (6th Cir. 1999). The court continued, "[a]n adverse employment action must typically constitute a materially adverse change in the terms of employment such as 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Summerville* 1999 WL 623786 at **8, quoting *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885-886 (6th Cir. 1996).

The Court reiterates that on summary judgment it must consider the facts in the light most favorable to the non-moving party. According to the Plaintiff, the change from forklift operator to actual work on the track constituted significant changes in her duties even though it did not constitute a formal change in job title or decrease in salary. Notably, working on the track involves physically-intense duties whereas operating a forklift involves significantly less physical duties. Specifically, the record indicates that the track laborers must carry heavy objects (e.g., heavy, cumbersome jacks that weigh approximately 110 pounds). Noting the evidence, the Court concludes that Plaintiff has met the burden of presenting evidence from which a jury could reasonably conclude that the change from forklift operator to working on the track was an adverse employment action.

Assuming *arguendo* that Defendant did take an adverse employment action against Plaintiff, liability may be avoided if Defendant can show a legitimate, non-retaliatory reason for the action. *See Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). On this point, Defendant asserts that its action resulted from complaints that a more senior employee should have the forklift operator position under the Collective Bargaining Agreement. This assertion is directly contradicted by Plaintiff's allegation that the Collective Bargaining Agreement does not cover the forklift operator position and by affidavits directly contradicting Defendant's assertion that several other employees had complained about Plaintiff holding the forklift position in lieu of a more senior employee. Spears Aff. at 2; Ellis Aff. at 1. Thus, the Plaintiff has presented sufficient evidence to create a genuine issue of material fact as to whether Defendant undertook the employment action for legitimate, nondiscriminatory reasons or the reasons proffered by Defendant are merely pretextual. Since this is a genuine issue of material fact, the Court FINDS that summary judgment on this point is inappropriate.

Plaintiff also claims that Defendant retaliated against her by wrongfully suspending her for insubordination. At the time Defendant took this action, it was aware that Plaintiff had filed complaints with the EEOC. Defendant does not raise an issue as to the adverse nature of this action. However, the Defendant does assert that the employment action occurred as the result of a legitimate, nondiscriminatory reason.

Once a defendant shows a legitimate, non-discriminatory reason for an employment action, the Plaintiff may show that the legitimate, nondiscriminatory reason offered by the Defendant is in fact pretextual and that the actual or overriding motivation for the action was retaliation. *See Canitia*, 903 F.2d at 1066. Plaintiff does allege that Defendant's proffered reason is pretextual and that the action was in fact

based upon her filed claims. Taking this in the context of all the alleged facts, Plaintiff has shown a genuine issue of material fact on this point.

Conclusion

For the reasons stated above, Defendant's Motion for Summary Judgment is DENIED.

Entered this 28 day of August 2000.

/s/ Jon P. McCalla
JON P. MCCALLA
UNITED STATES DISTRICT JUDGE

BNSF

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

2650 LOU MENK DRIVE
POST OFFICE BOX 961055
FORT WORTH, TEXAS 76161

[redacted] EXHIBIT 4-11-00 1

APPLICATION FOR EMPLOYMENT

It is the policy of the company as an Equal Opportunity Employer to assure that there shall be no discrimination against any employee or applicant for employment on the grounds of age, race, color, creed, religion, sex, national origin, disability or veteran status, or any other status protected by law.

PERSONAL DATA

COMPLETED AT (CITY)	STATE		DATE FILED (Mo., Day, Yr.)
Memphis	Tennessee		April 28, 1997
NAME (Last)	FIRST	INITIAL	SOCIAL SECURITY NUMBER
White	Sheila	D.	410-98-2932
HOME ADDRESS (Number & Street)	CITY	STATE	
3942 Maynard Dr.	Memphis	Tennessee	
ZIP CODE	HOME PHONE NO.	DAYTIME PHONE NO.	
38109	785-6080 or 785-6588	785-6588	

Are you 18 years of age or older? ☒ Yes ☐ No

Are you capable of performing the duties of the position applied for with or w/o reasonable accommodation? ☒ Yes ☐ No

Are you legally eligible for employment in this country? ☒ Yes ☐ No Proof of employment eligibility will be required upon employment.

Have you ever been convicted of a crime? (A conviction record will not necessarily bar applicant from employment.) ☐ Yes ☒ No

If yes, describe in detail: _____

How many days have you missed from work for any reason in the last two years? None

Have you ever been employed by a railroad? ☐ Yes ☒ No If yes, give name of railroad(s) _____

Position(s) held _____ When and where? _____

Reason for leaving _____

Do you have any relatives presently employed by BNSF? ☐ Yes ☒ No If yes,

EXHIBIT 5 99-2733 6-3-00

NAME:	RELATION:	JOB TITLE:	LOCATION:

POSITION

POSITION DESIRED:	SALARY EXPECTED:	WORK AVAILABILITY
Maint. of Way Labor	$ Open. MONTH	☒ FULL TIME ☐ PART TIME ☐ SHIFT WORK
ARE YOU WILLING TO TRAVEL? ☒ YES ☐ NO IF YES, ANY RESTRICTIONS?		CAN WE CONTACT YOUR PRESENT EMPLOYER FOR A REFERENCE? ☒ YES ☐ NO ☐ NA
ARE YOU WILLING TO RELOCATE? ☒ YES ☐ NO IF YES, ANY RESTRICTIONS? Do I have to?		

EMPLOYMENT HISTORY

	NAME OF EMPLOYER	TYPE OF BUSINESS	DATES	SALARY
PRESENT OR LAST EMPLOYER	Schering Plough.	Production		
	ADDRESS 3030 Jackson Ave.	PHONE NUMBER (901) 320-2011	FROM 1986	STARTING $7.75
	REASON FOR LEAVING Plant - Closing	DESCRIPTION OF JOB DUTIES Machine - Operator	TO 1996	ENDING $11.81
	SUPERVISOR & TITLE Roman Jackson Supvr	ARE YOU ELIGIBLE FOR REHIRE? ☐ YES ☒ NO		

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BEST AVAILABLE COPY

			DATES	SALARY
2ND PREVIOUS EMPLOYER	Kimberly-Clark (901 Chelsea Div.)			
	ADDRESS 500 Mahannia Hwy. Memphis, Tenn.	PHONE NUMBER N/A	FROM 1985	STARTING $10.0
	REASON FOR LEAVING Close-Down	DESCRIPTION OF JOB DUTIES Machine-Operator	TO 1985	ENDING $10.31
	SUPERVISOR & TITLE Gus Williams	ARE YOU ELIGIBLE FOR REHIRE? ☐ YES ☒ NO		
3RD PREVIOUS EMPLOYER	NAME OF EMPLOYER	TYPE OF BUSINESS	DATES	SALARY
	ADDRESS	PHONE NUMBER	FROM	STARTING
	REASON FOR LEAVING	DESCRIPTION OF JOB DUTIES	TO	ENDING
	SUPERVISOR & TITLE	ARE YOU ELIGIBLE FOR REHIRE? ☐ YES ☐ NO		

EDUCATION

Type of School	Name & Location of School	Degree Earned	Major/Minor Fields of Study
High School Bus. Tech or Trade School	Fairley High, 4950 Fairyld. Memphis, Tenn.	yes Diploma)	
College(s)			
Other	N/A		

MILITARY SERVICE None

Branch	Date Entered	Date Discharged	Rank at Entry	Final Rank

Duties performed

Service schools or special experience N/A

Did you receive a dishonorable discharge? ☐ Yes ☐ No ☒ N/A

ADDITIONAL QUALIFICATIONS

Professional licenses, registrations or certifications N/A

Languages other than English and proficiency (1=Basic, 2=Working knowledge, 3=Advanced) N/A

List any additional skills or abilities you would like us to consider in evaluating your qualifications

Use of hands, heavy lifting, working with Jacket Hammers and other heavy machinery, all have worked in hot or cold weather, also hard hrs

Salary is of core importance to the success of duty by BNSF Employees. If hired, do you agree to learn and obey all safety rules relating to your job? Yes ☒ No ☐

It is the policy of the BNSF to help rehabilitate its injured employees so they can return to gainful employment. Do you agree, in the event you are injured while employed by the BNSF, or disabled for any reason, to cooperate with the doctors and rehabilitation agencies designated by the Company so they can help you return to gainful employment? Yes ☒ No ☐

I certify that all information given in this application has been carefully examined and is correct to the best of my knowledge and belief. I authorize investigation of all statements contained in my application for employment. I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR HEREIN WILL BE SUFFICIENT CAUSE FOR CANCELLATION OF CONSIDERATION OF ANY EMPLOYMENT OR GROUNDS FOR DISMISSAL AT ANY TIME, REGARDLESS OF WHEN SUCH INFORMATION IS DISCOVERED. STATEMENTS IN THIS EMPLOYMENT APPLICATION ARE NOT TO BE CONSIDERED AS PART OF ANY CONTRACT OF EMPLOYMENT. I UNDERSTAND THAT BNSF HAS AN ARBITRATION POLICY AND THAT I MUST SUBMIT ANY DISPUTE OVER TERMINATION OF MY EMPLOYMENT OR MY EXEMPT STATUS TO ARBITRATION.

2. If an offer of employment is made, I consent to undergo any required medical examinations which are necessary as a condition of my initial employment, commencing employment and fitness for any other positions for which a determined disability is pre-existing. BNSF will provide qualified applicants and employees with disabilities reasonable accommodation(s) that do not impose undue hardship, or a direct threat to health or safety. I understand these medical examinations, including the pre-employment physical examination, include an alcohol and drug screen as part of its testing procedures and I have been informed of BNSF's drug and alcohol testing policy.

3. I agree to observe faithfully all applicable rules and regulations of the Company.

4. I agree, on behalf of myself, my heirs and personal representatives, that in the event of any claim or litigation involving this Company in which my records or physical conditions or [illegible] any physician, hospital, clinic, Veterans' Administration or other agencies may furnish to this company any facts or records concerning same, whether derived from confidential relations or otherwise, and I hereby ratify in any court in the same case, and I expressly waive the benefits of ANY State or Federal law which would such information is considered wholly or partially privileged.

5. I agree that my employment with BNSF is at will and may be terminated by me or BNSF at any time without notice, subject to any provisions of an applicable collective bargaining agreement.

6. THIS APPLICATION SHALL BE CONSIDERED ACTIVE FOR A PERIOD OF SIX (6) MONTHS FROM THE DATE OF FILING, AND IF I WISH CONSIDERATION AFTER THAT TIME IT WILL BE MY RESPONSIBILITY TO FILE A NEW APPLICATION. I UNDERSTAND THAT THIS APPLICATION IS NOT VALID WITHOUT MY SIGNATURE.

APPLICANT'S SIGNATURE Sheila D. White DATE April 28, 1997

DO NOT COMPLETE THIS SECTION

Applicant meets all of the qualifications for employment with The Burlington Northern and Santa Fe Railway Company and is approved for the following position.

Position	Department/Division	City, State	
Track Laborer	Southeastern Division	Memphis, TN	
Date Employed 06/23/97	Time Started	Salary/Wage	Disposition
Employing Officer's Signature		Title Employee Relation	Date 6/13/97

APR-28-1997 09:32 708 780 5180 98% A00102

AGREEMENT

Between
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
and its employees represented by
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Effective August 1, 1978

* * * *

ARTICLE 11

Claims, Grievances and Discipline

Rule 90. Claim and Grievance Rule

(a) All claims or grievances shall be handled as follows:

(1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(2) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but his shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by

agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(3) The requirements outlined in Paragraphs (a) (1) and (2), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine months' period herein referred to.

(b) A claim may he filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(c) This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employes it represents.

(d) This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine months of the date of the decision of the highest designated officer of the Carrier.

(e) This rule shall not apply to requests for leniency.

Rule 91. Discipline Rule

(a) Employes disciplined or dismissed will be advised of the precise charge of such action, in writing if requested.

(b) An employe who considers that he has been unfairly disciplined or dismissed, or who considers himself unjustly treated shall be entitled to the following handling of his complaint:

(1) The employe, or the General Chairman acting in behalf of the employe, shall make written request for an investigation to the employe's immediate supervisor. Such request shall be made within 15 days from date of discipline, dismissal or alleged unjust treatment.

(2) If a request for an investigation is made in compliance with requirements of paragraph (1) above, the employe shall be afforded a fair and impartial investigation. The investigation will be held within 15 days of the date of the request made by the employe or the General Chairman, unless a post-ponement is agreed upon by the Carrier and Organization representatives.

(3) The employe may be represented by duly accredited representative of the Brotherhood of Maintenance of Way Employes; and shall have the right to have present, without cost to the Carrier, such witnesses as he may desire.

(4) A copy of all statements taken at a completed investigation will be furnished duly accredited representative of employe. Employes, on request, will be given copy of their own statement upon verifying and signing same.

(5) A decision will be rendered by the Carrier within 10 days after completion of the investigation.

(6) If the charge against the employe is not sustained, it shall be stricken from the record. If by reason of such unsustained charge the employe has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of the service of the Carrier at not less than the rate of pay of position formerly held, or for the difference in rate of pay earned if in the service, less any amount earned in other employment.

(7) An employe dissatisfied with a decision will have the right to appeal in succession up to and including the highest officer designated by the management to handle such cases. The right of the employe to be assisted by duly accredited representatives of the employe is recognized.

(8) The provisions of Rule 90 will be applicable to the handling of appeals in discipline cases. No discipline case shall be considered unless the provisions of this Rule 91 (b) (1) and Rule 90 are complied with.

* * * *

BURLINGTON NORTHERN
Position Description

Position: Maintenance of Way Laborer

Date Prepared: January 26, 1993

Reports to:

Summary of Maintenance of Way Position:

The Maintenance of Way Laborer removes and replaces track components (e.g., ties, rails, bars, etc.) using various power and non-power hand tools. The Maintenance of Way Laborer may also lift and carry track material, cut brush, trees and vegetation, and clear the right-of-way of junk, litter, and cargo spillage.

Key Work Activities:

1. Inspects materials and equipment to determine if they are connected correctly and/or working correctly, before starting work.
2. Pulls spikes from tie.
3. Drills holes through rails for insertion of bolts, drives fastener (spikes, lags, etc.), tightens or loosens bolts.
4. Cuts rails.
5. Tamps track and manually tamps ballast.
6. Removes, installs, and moves ties.
7. Lifts, rolls, and adjust rails.
8. Removes and installs anchors.
9. Plugs spike holes.
10. Lifts and carries track material with assistance (e.g., spike cans, anchor bags, angle bats).
11. Removes and replaces ballast.

12. Sorts, segregates, and integrates materials for use with on-track machinery.
13. Cuts brush, trees, and vegetation.
14. Unloads, or assists in unloading ballast.
15. Clears right-of-way of junk, litter, and cargo spillage.
16. Operates non-power hand tools such as hammers, screwdrivers, files, wrenches, or pliers.
17. Operates large non-power tools such as shovels, picks, axes, cutters, or sledgehammers.
18. Operates proper electric, pneumatic, or hydraulic hand tools such as drills, impact wrenches, jacks, power saws, and grinders.
19. Uses specialized hand tools (e.g., four-ball spike, spike maul, track jack, claw bars, etc.).
20. Performs all qualified duties, as necessary or as requested by management.

Key Skill Requirements

1. Job requires ability to understand and comply with all company policies, procedures, and follow instructions, both orally and in writing, including company policies. Includes the ability to comply with all company safety practices, and apply on-the-job safety training to recognize and react to possible safety hazards.
2. Must demonstrate a teamwork orientation by displaying positive, friendly interactions with co-workers and supervisors.
3. Job requires ability to effectively communicate with co-workers and supervisors, both face-to-face and through communication devices, and a willingness to learn or be trained in all facets of the position.

4. Job requires ability to read in order to deal with various aspects of the job (i.e., instructions, safety instructions, book of rules and regulations).

5. Job requires ability to add, subtract, multiply, or divide whole numbers in order to deal with various aspects of the job (i.e., count ties, spikes, etc.)

6. Job requires travel to job sites around the country and remaining on-site for an extended period of time (sometimes days at a time), arid working variable hours, weekends, holidays, and overtime.

7. Job requires ability to work with little or no direct supervision.

8. Job requires ability to recognize and react to safety hazards.

9. Job requires ability to recognize audible signals and warnings.

10. Job requires ability to distinguish colors, signals, or signs.

11. Job requires ability to visually inspect work, materials or equipment and determine if it matches a "standard" or specification.

12. Job requires ability to react or respond quickly when the appearance of a stimulus requires the initiation of a response.

13. Job requires ability to judge distances or speeds.

14. Job requires ability to perform activities requiring the coordination of gross hand movements with visual information.

15. Job requires ability to maintain balance while working in or around moving equipment, on uneven terrain or on track ballast.

16. Job requires ability to lift or carry objects or materials weighing over 50 pounds.
17. Job requires ability to maintain a high level of muscular exertion for an extended period of time, involving the hands, arms, back or legs to lift, push, roll, or carry objects.
18. Job requires ability to make quick or repeated movements (bending, stretching, twisting, reaching) with arms, legs, or body.

Environmental Factors

1. Job involves working outdoors in a variety of weather conditions (e.g., heat, rain, wind, humidity, etc.).
2. Job requires working around moving or heavy equipment.
3. Job involves exposure to above normal noise level.

[BNSF LOGO]

Burnie D. Vaughn
Division Engineer

Burlington Northern Santa Fe
5280 Shelby Drive
Memphis, TN 38118

January 16, 1998

Mr. E.R. Spears-General Chairman BMWE
610 Woodruff Building
P.O. Box 50396
Springfield, Mo 65805-0396

Dear Mr. Spears:

Referring to investigation on Ms. S. D. White, SSN 410-98-2432, held on January 6, 1998, in Memphis, Tennessee, copy attached.

After careful review of the transcript of this investigation, the charges as read in the transcript are not sustained. Therefore, I have decided to reinstate Ms, White to her former position.

All back pay and time lost will be paid by the carrier. Also, all charges pertaining to this matter are hereby stricken from her personal record.

Ms. White will be reinstated to her position immediately.

Sincerely,

/s/ Burnie D. Vaughn
BURNIE D. VAUGHN

cc: Ms. S. D. White
Darryl Gabriel
M. J. Brown
K L. Parton—Labor Relations—Ft. Worth
Manpower Planning
Personal Records

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

No. 99-2733-MI

SHEILA WHITE,

Plaintiff,

vs.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

TRIAL PROCEEDINGS

BEFORE THE
HONORABLE JON PHIPPS McCALLA, JUDGE

SEPTEMBER 5, 2000

VOLUME IV

* * * *

[772] To establish the third element of her retaliation claim, the existence of an adverse employment taken, . . . the plaintiff must show that she suffered a material adverse change in the terms or conditions of employment because of the employer's actions.

In determining whether the plaintiff suffered a materially adverse change in the terms or conditions of her employment, you may consider the following:

1. Whether there was termination of employment.

2. Whether there was demotion, evidenced by a decrease in wage or salary.

3. Whether there was less—whether there was some less distinguished title.

4. Whether there was a material loss of benefits.

[773] 5. Whether there was significantly diminished material responsibilities.

6. Other indications that might be unique to a particular situation.

* * * *

AMICUS CURIAE BRIEF

(12)

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No. 05-259

In the Supreme Court of the United States

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER

v.

SHEILA WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff who asserts a claim of retaliatory discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), must show that she suffered a materially adverse employment action.

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INTEREST OF THE UNITED STATES

This case presents the question whether an employee who asserts a claim of discriminatory retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), must show that she suffered a materially adverse employment action. The United States has a significant interest in the resolution of that question. The Attorney General is responsible for enforcing Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an employer. See 42 U.S.C. 2000e-16. The United States, as the principal enforcer of the civil rights laws and the Nation's largest employer, therefore has a strong interest in the fair and balanced enforcement of Title VII.

STATEMENT

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his * * * terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Title VII also makes it an unlawful employment practice for an employer "to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by [Title VII] * * * or because he has made a charge * * * under [Title VII]." 42 U.S.C. 2000e-3(a). This case involves the scope of the latter prohibition, which is known as Title VII's anti-retaliation provision.

1. In June 1997, petitioner Burlington Northern hired respondent Sheila White to work in its Maintenance of Way department at its Tennessee Yard in Memphis. Pet. App. 3a. Respondent's general job classification was "track laborer." J.A. 37. Marvin Brown, the roadmaster at the Tennessee Yard, assigned respondent to operate the forklift. Pet. App. 3a. Unlike most other track laborers, respondent therefore spent the bulk of her day operating the forklift. Respondent was the only female in the Maintenance of Way department. *Ibid.* Her immediate supervisor, foreman Bill Joiner, did not believe that it was appropriate for a woman to work in that department, and he repeatedly told her that. *Ibid.* According to respondent, several other employees also expressed their belief that women should not "work on a railroad." *Ibid.* Joiner, however, acknowledged that "White had no problems performing her job." *Id.* at 3a-4a.

On September 16, 1997, respondent complained to Brown that Joiner had been sexually harassing her. Pet. App. 4a. After an investigation, petitioner suspended Joiner for ten days and ordered him to attend a training session on sexual harassment. *Ibid.* Brown informed respondent about Joiner's discipline. *Ibid.* At the same time, he told her that he was reassigning her

from the forklift job to a "standard track laborer position." *Ibid.* Brown explained that other employees had objected to respondent operating the forklift instead of a more senior man because the forklift job was "less arduous and cleaner" than track work. *Ibid.* Respondent's pay and benefits remained the same, but the focus of her responsibilities became repairing railroad tracks. *Ibid.*; see Tr. Tran. 126-128 (respondent's testimony).

On October 10, 1997, respondent filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that petitioner had discriminated against her on the basis of sex and had retaliated against her for complaining about sexual harassment. Pet. App. 5a. On December 4, 1997, respondent filed a second charge with the EEOC, alleging retaliation on the ground that Brown had placed her under surveillance. *Ibid.*

On December 11, 1997, respondent was working with a regional tie gang under the supervision of Percy Sharkey, one of petitioner's foremen. Pet. App. 5a. Sharkey told respondent to ride with James Key, another foreman, and told Greg Nelson, another track laborer, to ride with him. *Id.* at 5a-6a. According to respondent, when she approached Key, he told her to ride with Sharkey, and then drove away with Nelson. *Id.* at 6a. According to Sharkey, respondent refused to ride with Key. *Ibid.* When Sharkey told Brown his version of events, Brown instructed Sharkey to remove respondent from service for insubordination. *Ibid.* That afternoon, Sharkey suspended respondent without pay. *Ibid.* Nelson, who had disobeyed Sharkey's instruction to ride with him, did not receive any discipline. *Ibid.*

Respondent filed a grievance with her union to challenge the suspension without pay, and she filed another charge of retaliation with the EEOC. Pet. App. 6a-7a. While the grievance was pending, respondent did not have a job or income. *Id.* at 7a. During that time, respondent sought medical treatment for emotional distress and incurred medical expenses. *Ibid.* On January 16, 1998—37 days after respondent's initial suspen-

sion—petitioner resolved respondent's grievance in her favor, and reinstated her with full back pay. *Ibid.*

2. After exhausting her administrative remedies with the EEOC, respondent filed suit in federal district court under Title VII, alleging that petitioner had subjected her to discrimination because of her sex and because she had opposed such discrimination. Pet. App. 7a. A jury trial was held at which the jury was instructed that, in order to prove actionable retaliation, respondent was required to show that she suffered a material adverse change in the terms or conditions of her employment. J.A. 63. The jury returned a verdict in respondent's favor on the discriminatory retaliation claim and a verdict in favor of petitioner on the sex discrimination claim. Pet. App. 7a. The jury awarded respondent $43,500 in compensatory damages. *Ibid.* The district court denied petitioner's motion for judgment as a matter of law on respondent's retaliation claim. *Id.* at 116a-126a.

3. A divided panel of the court of appeals reversed the district court's judgment on respondent's retaliation claim. Pet. App. 84a-115a. The panel held that neither the removal of respondent's forklift duties nor her 37-day suspension without pay was sufficiently adverse to give rise to a retaliation claim. *Id.* at 94a-104a. Judge Clay dissented. *Id.* at 105a-115a. In his view, the jury was entitled to find that respondent's "effective demotion [from forklift operator to standard track laborer] and subsequent suspension * * * constituted the requisite materially adverse employment action." *Id.* at 106a.

4. The court of appeals granted rehearing en banc, vacated the panel decision, and, in pertinent part, affirmed the district court's judgment on respondent's retaliation claim. Pet. App. 1a-83a. The court unanimously concluded that the removal of respondent's forklift duties and her suspension without pay both

constituted actionable discrimination under Title VII's anti-retaliation provision. *Id.* at 19a-25a, 35a, 50a.[1]

a. The court of appeals explained that, to establish a prima facie case of retaliation under Title VII, a plaintiff must show that she suffered an "adverse employment action." Pet. App. 8a-9a. The court then defined that term as "a materially adverse change in the terms of her employment." *Id.* at 13a (citation omitted). The court pointed to this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998), where the Court stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." See Pet. App. 14a. The court rejected the EEOC's position that an "adverse employment action" in this context means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." *Id.* at 15a (quoting 2 EEOC Compl. Man. (CCH) § 8008, at 6512 (July 31, 1998)).

The court explained that the EEOC's standard was not supported by the language of Title VII's anti-retaliation provision. Pet. App. 16a. The court acknowledged that the EEOC's standard furthers that provision's purpose of ensuring that persons are not deterred from filing Title VII complaints. *Id.* at 17a. But it concluded that the materially adverse standard also furthers that purpose as well, while preventing lawsuits "based on trivialities." *Ibid.* The court also concluded that while the EEOC's standard requires case-by-case determinations, the materially

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[1] In its other primary ruling, the court of appeals held that the district court erred in instructing the jury on punitive damages and remanded the case for a new trial only on punitive damages. See Pet. App. 28a-34a. Judge Sutton —who agreed with the majority decision upholding the jury's verdict on respondent's retaliation claim—dissented with respect to the punitive damages issue. See *id.* at 50a-61a. The punitive damages issue is not before this Court.

adverse standard provides significant guidance on what actions "rise above the level of the trivial." *Ibid.* The court also explained that the EEOC's position would require the application of different "discrimination" standards to retaliation claims and other Title VII claims, even though Title VII uses the same "discriminate against" language for both kinds of claims. *Ibid.*

b. Applying the "materially adverse employment action" standard, the court of appeals held that respondent's 37-day suspension without pay was actionable. Pet. App. 19a-24a. The court rejected petitioner's contention that respondent's reinstatement with full back pay precluded such a finding. *Ibid.* The court reasoned that Title VII does not limit prohibited retaliation to ultimate employment decisions. *Id.* at 22a. The court also concluded that petitioner's position would conflict with Title VII's make-whole purposes because it would preclude an employee who has been wrongfully suspended from recovering either interest on back pay or damages for emotional suffering. *Id.* at 23a. The court also explained that petitioner's position was at odds with decisions of this Court holding that a statute of limitations runs from the time an unlawful act has occurred and is not tolled during a grievance process. *Ibid.*

The court also concluded that removing respondent's forklift duties and reassigning her to standard track duties qualified as a materially adverse employment action. Pet. App. 25a. The court explained that "the forklift operator position required more qualifications"; "the forklift operator position was objectively considered a better job"; and, "[i]n essence, as the district court found, the reassignment was a demotion." *Ibid.* The court also stated that the track laborer position was "more arduous and 'dirtier'" than operating the forklift. *Ibid.*

c. Judge Clay filed a concurring opinion in which four other judges joined. Pet. App. 35a-50a. He would have adopted the EEOC's standard for proving a retaliation claim, *i.e.*, "an employer's retaliatory action is sufficiently adverse for § 704(a) pur-

poses if it would be 'reasonably likely to deter [employees] from engaging in protected acvtivity.'" *Id.* at 35a (quoting *Ray* v. *Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000)). Applying that standard, Judge Clay concluded that the removal of respondent's forklift duties and her suspension constituted adverse actions that were actionable under Title VII. *Id.* at 50a.

SUMMARY OF ARGUMENT

Title VII's anti-retaliation provision (Section 2000e-3(a)) adopts the same threshold requirement for discrimination as the Act's core prohibitions. Applying settled principles, Section 2000e-3(a) should be interpreted in context and in light of the Act's overall structure. In the preceding provisions of the Act, Title VII describes in detail the "[u]nlawful employment practices" that employers, employment agencies, labor organizations, and training agencies may not take on the basis of race, sex, or another prohibited factor. 42 U.S.C. 2000e-2. As to employers, the Act provides that an employer may not rely on such prohibited characteristics, *inter alia*, "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The Act uses different language to impose comparable prohibitions on employment agencies, labor organizations, and training agencies. When read in context, the natural inference is that Congress used the phrase "discriminate against" in Section 2000e-3(a) as a short hand for employment practices that would be unlawful if done on account of race, sex, or another prohibited factor. Section 2000e-3(a) thus creates an additional basis for unlawful discrimination, but does not create a different or more expansive concept of discrimination than the Act's core prohibitions.

That interpretation of Section 2000e-3(a) creates a uniform discrimination standard for Title VII that sets the bar at the level Congress deemed appropriate to deter outright discrimination. Conduct that does not give rise to an actionable violation of Title

VII's primary prohibitions on discrimination on the basis of race or sex should not give rise to a claim for retaliation.

To prove actionable discrimination under Title VII's anti-discrimination provisions (including Section 2000e-3(a)), a plaintiff must show that she has been subjected to a materially adverse employment action, *i.e.*, a materially adverse change in the terms, conditions, or privileges of employment. That standard dovetails with the standard that this Court adopted in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), for describing a "tangible employment action" that would subject an employer to vicarious liability for sexual harassment committed by one of its supervisors. The Court stated that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. In addition, the Court drew support for that definition from lower court case law applying the materially adverse employment action standard. *Ibid.* *Ellerth* also reaffirmed that a "hostile work environment" that is based on "a showing of severe or pervasive conduct" likewise "constitutes a change in the terms or conditions of employment that is actionable under Title VII," *id.* at 753-754, and thus constitutes a materially adverse employment action.

The court of appeals correctly held that a jury was entitled to find that each of the retaliatory acts at issue constitutes a materially adverse employment action and, therefore, actionable discrimination under Title VII. Respondent's 37-day suspension without pay represented a significant change in her employment status. The fact that she was later reinstated with back pay affects the appropriate remedy for a retaliatory suspension, but does not eliminate the initial discrimination. Likewise, respondent's reassignment from operating a forklift to repairing railroad tracks constitutes a materially adverse action because a jury could reasonably find that it represented a significant

change in her responsibilities, even though her job title remained the same. Indeed, the court of appeals stated that the "forklift operator position required more qualifications," and that the reassignment was tantamount to a "demotion." Pet. App. 25a.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT WAS SUBJECTED TO ACTIONABLE DISCRIMINATION UNDER TITLE VII'S ANTI-RETALIATION PROVISION

A. Title VII's Anti-Retaliation Provision Should Be Read *In Pari Materia* With Title VII's Core Prohibitions

Title VII's anti-retaliation provision makes it unlawful "for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a). The basic question presented by this case is what discrimination is actionable under Section 2000e-3(a). When Section 2000e-3(a) is read, as it must be, in context and in light of Title VII's surrounding provisions and its broader function as a prohibition against *employment* discrimination, the statute's reference to "discriminat[ion]" naturally incorporates the same threshold underlying Title VII's core anti-discrimination prohibition (*i.e.*, Section 2000e-2). Thus, where an employer's act would constitute actionable employment discrimination if done on account of an employee's race, sex, or other prohibited factor, Section 2000e-3(a) makes it actionable if done on account of a Title VII charge or other protected activity.

1. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Thus, Title VII, "like every Act of Congress, should not be read as a

series of unrelated and isolated provisions," but rather as "a symmetrical and coherent regulatory scheme." *Gustafson* v. *Alloyd Co*, 513 U.S. 561, 570 (1995). See also *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959) (statutory provisions should be read so that they fit into "an harmonious whole"). The "discriminat[ion]" referred to in Title VII's anti-retaliation provision therefore must be interpreted in light of the Act's surrounding provisions, and not as an unrelated or isolated term.

In the provisions preceding Title VII's anti-retaliation provision, Title VII sets out in elaborate detail the "unlawful employment practice[s]" that employers, employment agencies, and labor organizations may not take against individuals because of their "race, color, religion, sex, or national origin." See 42 U.S.C. 2000e-2(a)-(d). In particular, an employer may not use those prohibited characteristics "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The subsequent provisions of Section 2000e-2 likewise detail the practices in which employment agencies and labor organizations may not engage based on those prohibited characteristics. 42 U.S.C. 2000e-2(b) (employment agencies); 42 U.S.C. 2000e-2(c) (labor organizations). In addition, Section 2000e-2 further defines the kind of actions that the statute does and does not treat as unlawful employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. 2000e-2(e)-(n).

Section 2000e-3(a)—entitled "Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings"—must be read in light of these preceding provisions. Particularly when read in that light, the natural inference is that Congress used the phrase "discriminate against" as shorthand for the employment practices that it had previously identified as unlawful, if taken on the basis of race, color, religion, sex, or national origin. That is consistent with the way that this Court

has interpreted Title VII. In *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005), the Court not only recognized that Title VII is distinct from other civil rights statutes in that it "spells out in greater detail the conduct that constitutes discrimination in violation of that statute," but it referred by shorthand to "the conduct that constitutes discrimination in violation of [Title VII]" as the conduct defined in the Act as "unlawful employment practices." *Id.* at 1505.

The inference that Congress intended Section 2000e-3(a) to cover the same type of discriminatory conduct barred by Section 2000e-2 is particularly strong because the anti-retaliation provision uses the terms "unlawful employment practice," and "discriminate," both of which are used repeatedly throughout Title VII's core prohibitions in Section 2000e-2. See *e.g.*, 42 U.S.C. 2000e-2(a), (b), (c), and (d). That common usage is a specific manifestation of Congress's intent to tie the scope of the retaliation prohibition to Title VII's core prohibitions. See *Gustafson*, 513 U.S. at 568. The inference that Congress intended Section 2000e-3(a) to be read in *pari materia* with Section 2000e-2 is further strengthened by the fact that Section 2000e-3(a) refers to each of the principal types of employment groups that are separately addressed in Section 2000e-2(a)-(d), *i.e.*, employers, employment agencies, labor organizations, and training programs. Without repeating the more detailed language of those sections, Section 2000e-3(a) adds participation in Title VII's remedial process as a forbidden basis for discrimination of the specific forms made relevant to employers, employment agencies, labor organizations and training programs respectively.

Conversely, reading Section 2000e-3(a)'s reference to "discriminate against" to cover *any* kind of discrimination (*i.e.*, differential treatment) would improperly fail to account for the fact that Congress used that phrase in a statute that is explicitly addressed to *particular* types of discrimination—*i.e.*, the employment-related discrimination specified in Section 2000e-2,

the immediately preceding provision. Cf. *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 545 (2002) ("With respect to *dismissals* the tolling provision covers, one could read § 1367(d) in isolation to authorize tolling regardless of the reason for dismissal, but § 1367(d) occurs in the context of a statute that specifically contemplates only a few grounds for dismissal"); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976) (provision stating without qualification that an order remanding a case is not appealable is to be read *in pari materia* with the preceding subsection and is therefore limited to the kinds of remand orders set out in that subsection).

Title VII's anti-retaliation provision thus creates an additional protected class (*i.e.*, employees who engage in a protected activity), but not a different or more expansive concept of discrimination than the statute's basic anti-discrimination provision. Section 2000e-2—the Act's core anti-discrimination provision—prohibits an employer from discriminating against an employee on account of race, sex, or another prohibited factor. And Section 2000e-3(a)—the anti-retaliation provision—prohibits an employer from discriminating against an employee for filing a charge or engaging in other protected activity. Thus, an employer could not fire, dock in pay, or subject an employee to a hostile work environment because of her sex, and it could not do so because she *charged* discrimination on account of sex either. But while Section 2000e-2 and 2000e-3(a) prohibit different bases for discrimination, the "quantum of discrimination" that is actionable under both provisions is "coterminous." *Jensen* v. *Potter*, 435 F.3d 444, 448 (3d Cir. 2006) (opinion by Alito, J.).

The anti-retaliation provision bars discrimination against persons who engage in the specified forms of protected activity to the same extent that it bars intentional discrimination against employees because of their race, color, religion, sex, or national origin. That means that an employer may not discriminate against an employee because he has engaged in an activity pro-

tected by the anti-retaliation provision if that discrimination affects the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-(2)(a)(1). Likewise, an employer may not on account of such protected activity subject an employee to harassment that is severe or pervasive enough to alter the terms or conditions of employment by creating a hostile work environment. See *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 133 (2004); *Jensen*, 435 F.3d at 448-449.[2]

That *in pari materia* approach is consistent with the basic reality that Title VII is an *employment* discrimination statute. Although Congress could have prohibited all retaliation by employers, even against non-employee witnesses, it clearly chose to limit Section 2000e-3(a) to discrimination by an employer against "employees or applicants for employment." Just as Congress chose to limit the class of Section 2000e-3(a) plaintiffs to the same basic universe as Section 2000e-2 plaintiffs, it makes sense to read the type of employment actions covered by Section 2000e-3(a) as parallel to those covered by Section 2000e-2.

2. Interpreting Section 2000e-3(a)'s reference to "discrimi-

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[2] Section 2000e-2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive" the employee "of employment opportunities or otherwise adversely affect his status as an employee" on account of the employee's race, sex, or another prohibited factor. 42 U.S.C. 2000e-2(a)(2). Some courts have held that the anti-retaliation provision incorporates that discriminatory practice as well, see, *e.g.*, *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997), and that conclusion is consistent with an *in pari materia* construction of the Act. However, given the nature of a retaliation claim, an employee who alleges retaliation based on the kind of discrimination covered by Section 2000e-2(a)(2) would be required to establish an intentional act. See *Jackson*, 125 S. Ct. at 1504 ("Retaliation is, by definition, an intentional act."); *Jensen*, 435 F.3d at 449 n.2. Moreover, the vast majority of cases in which the question presented has arisen have involved alleged retaliatory discrimination that falls into the category of Section 2000e-2(a)(1). Because that is true of this case, the Court need not decide whether Title VII's anti-retaliation provision authorizes a claim based on an alleged disparate-impact covered by Section 2000e-2(a)(2).

nate against" to incorporate the same employment practices covered by Title VII's basic anti-discrimination provision promotes consistency because it would establish a uniform standard for determining whether an employment practice is actionable under Title VII. Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) ("[W]e think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."). Furthermore, interpreting Section 2000e-3(a) to adopt the same "discrimination" threshold as the Act's basic anti-discrimination provision promotes the balance that Congress struck in Title VII between preventing pernicious discrimination in the workplace and "prevent[ing] Title VII from expanding into a general civility code." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); see *Faragher*, 524 U.S. at 787. Likewise, this interpretation promotes Congress's intent to ensure that employees may invoke statutory remedial mechanisms, see *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997), because it sets the bar for establishing actionable discrimination on account of filing a Title VII charge at the same level that Congress deemed appropriate to deter outright discrimination on account of race, sex, or another prohibited factor.

A contrary conclusion would attribute to Congress an intent to afford employees *greater* protection from protected activity discrimination than from intentional discrimination based on race, color, religion, sex, or national origin. Although Congress could certainly create such a hierarchy, there is no reason to assume lightly that Congress would have such an intent. As pernicious as retaliatory behavior is, discrimination against an employee because of her race or sex is no less pernicious. Indeed, retaliation is prohibited in the statute to further the statute's *primary* prohibition on discrimination against race, sex, religion, or national origin. There is certainly no reason to conclude that Congress believed that the trigger set by Section 2000e-2 for actionable discrimination on account of race or sex

was too forgiving to root out discrimination on account of filing a Title VII charge. See *Von Gunten* v. *Maryland*, 243 F.3d 858, 863 n.1, 865 (4th Cir. 2001) ("Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000-2.") (citation omitted).[3]

In enacting Title VII, Congress granted American employees broad-based protection against discrimination based on personal characteristics, such as race and sex. See *Oncale*, 523 U.S. at 78 (Section 2000e-2(a) "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (citation omitted). In Section 2000e-3(a), Congress sought to give employees who file a charge or engage in other protected activity that same level of protection.[4]

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[3] Congress knows how to decouple a retaliation provision from the more basic prohibition in an anti-discrimination statute. For example, in enacting the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, Congress not only prohibited "discriminat[ing]" against a disabled individual because he filed a complaint about disability discrimination, 42 U.S.C. 12203(a) (entitled "Retaliation"), but it also separately provided that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any individual" for exercising any right granted by the ADA, 42 U.S.C. 12203(b) (entitled "Interference, coercion, or intimidation"). Under such a provision, it is enough for a claimant to allege "interference, coercion, or intimidation" without having to allege separately that an employer's action constituted "discrimination" as that term is used in the Act's core prohibitions.

[4] In guidance issued in 1998, the EEOC stated that Title VII's anti-retaliation provision reaches "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." 2 EEOC Compl. Man. (CCH) § 8008, at 6512 (July 31, 1998). Under that test, which has both an objective and a subjective component (see *Vasquez* v. *County of Los Angeles*, 349 F.3d 634, 646 (9th Cir. 2003)), the anti-retaliation provision's threshold for discrimination is potentially more expansive than the threshold for the Act's core prohibitions. The Ninth Circuit has adopted the 1998 EEOC guidance, see *ibid.*, and the EEOC filed an amicus brief below advocating that view. Two other circuits have adopted a purely objective test which applies the anti-retaliation provision

B. The Principal Arguments For Interpreting The Anti-Retaliation Provision More Expansively Than Title VII's Core Prohibitions Are Unpersuasive

The lower courts and dissenting judges that have rejected the foregoing interpretation and concluded that Title VII's anti-retaliation "discrimination" threshold is more expansive than the threshold for the Act's core prohibitions have relied on three principal considerations. None is persuasive.

1. First, because Section 2000e-(3)(a) does not repeat the language "terms, conditions, or privileges of employment," which appears in Section 2000e-2(a)(1), the concurring judges below drew the conclusion that Section 2000e-(3)(a) was intended to cover "*any* form of discrimination." See Pet. App. 36a, 37a (Clay, J., concurring) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

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to action that is reasonably likely to deter. See *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116, at *8 (D.C. Cir. Feb 28, 2006) (plaintiff must show that the "'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Washington* v. *Illinois Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)). In practice, the results under the various formulations may not vary greatly. Nonetheless, for the reasons explained in the text above, the *in pari materia* approach advocated above is the better reading of the statute. If this Court disagrees, it should, at a minimum, follow the lead of the Seventh and District of Columbia Circuits and adopt a purely objective version of the "reasonably likely to deter" test. A subjective element injects unpredictability and administrative difficulties into the inquiry. In the First Amendment retaliation context (where courts are not bound by the text of any statutory provision), the majority of courts have adopted an analogous "deter a person of ordinary fitness" test that is purely objective. See *Bennett* v. *Hendrix*, 423 F.3d 1247, 1251-1254 (11th Cir. 2005), petition for cert. pending, No. 05-989 (filed Feb. 6, 2006). For all the reasons stated in Part D below, an affirmance would be required under the reasonably likely to deter standard as well.

The "disparate inclusion" principle articulated in *Russello* is just one tool of statutory construction, not an inexorable command. It is therefore inapplicable when there is an alternative explanation for the difference in wording or more persuasive evidence of congressional intent. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-437 (2002); *Thermtron*, 423 U.S. at 345-346. Both are present here. First, because Section 2000e-3(a) prohibits retaliation in conjunction with the various forms of conduct separately addressed in subsections 2000e-2(a)-(d) treating employers, employment agencies, labor organizations, training programs, respectively, the omission of the "terms, conditions, or privileges" phrase was integral to a formulation that avoided restating much of the text in the preceding subsections of 2000e-2.

More broadly, as discussed in Part A above, the surrounding provisions and overall structure of the Act; the common use of the terms "unlawful employment practice" and "discriminate"; and the anomaly of concluding that Congress intended to adopt a narrower discrimination threshold standard under the Act's core prohibitions lead to the conclusion that Congress intended for the anti-retaliation provision to be coterminous in scope with Title VII's core prohibitions. Moreover, interpreting Section 2000e-(3)(a) to cover "*any* form of discrimination," Pet. App. 36a (Clay, J., concurring) (emphasis added), would greatly expand the reach of Title VII, including to acts outside the employment context. As discussed next, that result would be at odds with Title VII's explicit focus on "employment practices" and "employees."

2. Second, an argument has been made that tying the anti-retaliation provision to the scope of the core prohibitions would exclude non-employment-related acts of retaliation and thereby undermine the purpose of the anti-retaliation provision. That is incorrect. Precisely because the anti-retaliation provision exists to further the basic prohibitions in Section 2000e-2, it makes little

sense to conclude that Congress intended to make it harder to make out a claim of discrimination under the Act's core prohibition than under the anti-retaliation provision.

Title VII's discrimination threshold is tied to employment-related practices, and that squares with the text of the Act and its overall structure and objectives. See *Nelson* v. *Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) ("In view of Congress's objective in enacting Title VII, it is not surprising that cases dealing with unlawful retaliation under Title VII typically involve circumstances in which the defendant's conduct has impaired or might impair the plaintiff in employment situations.") (citing cases). Indeed, Title VII's anti-retaliation provision is explicitly defined as "an unlawful employment practice." 42 U.S.C. 2000e-3(a). In addition, the Act's basic prohibitions are explicitly tied to "employment practice[s]" as well. See 42 U.S.C. 2000-e(2). As that statutory language shows, Congress simply did not adopt an all-purpose prohibition against any conduct that might deter the filing of a complaint or the other protected activities; rather, it limited the Act's core prohibitions as well as its anti-retaliation provision to *employment-related* misconduct. That is hardly surprising in a statute's whose objective was "to achieve equality of employment opportunities." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971). Furthermore, when Congress wants to enact a broad-based anti-retaliation provision that extends beyond a civil rights law's basic prohibition, it knows how to do so. See, *e.g.*, 42 U.S.C. 12203(b), discussed note 3, *supra*. Cf. *Whitfield* v. *United States*, 543 U.S. 209, 217 (2005).

Other features of the anti-retaliation provision confirm that it is limited to employment-related conduct. By its terms, the anti-retaliation provision protects only "applicants for employment" and "employees." 42 U.S.C. 2000e-3(a). Thus, if an employer acted against a non-employee witness (for example, by cancelling an independent contractor's contract), that witness would not have a cause of action under the anti-retaliation provision. Similarly, the anti-retaliation provision governs only the

conduct of employers, employment agencies, joint labor-management committees, and labor organizations. *Ibid.* Accordingly, the anti-retaliation provision would not forbid a person that did not meet that description, such as a former co-worker, from taking an adverse action against an employee who filed a Title VII charge. As those examples illustrate, "no legislation pursues its purposes at all costs, * * * and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

Furthermore, the fact that Title VII's anti-retaliation provision—just like the Act's core prohibitions—is limited to employment-related actions does not mean that the victims of non-employment related misconduct are without a remedy. For example, if an employer engages in wrongful misconduct against an employee or potential witness outside of the employment relationship, the victim often may be able to assert a state-law cause of action. See *Nelson*, 51 F.3d at 388.[5]

3. The third argument against treating the scope of the retaliation provision as coterminous with the scope of Title VII's core prohibitions is that there may be employment-related actions that would deter an employee from charging discrimination, but would not be viewed as affecting the terms, conditions, or privileges of employment. See *Herrnreiter* v. *Chicago Hous. Auth.*, 315 F.3d 742, 746 (7th Cir. 2002), cert. denied, 540 U.S. 984

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[5] It is clear that Title VII's federal employer provisions do not extend beyond the employment practices addressed in the Act's basic prohibitions. Section 2000e-16(a) provides that "personnel actions affecting" federal government employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." That provision has been interpreted to prohibit retaliatory discrimination, see, *e.g.*, *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976), and because there is a single prohibition on discrimination (without a separate anti-retaliation provision), the federal government's potential liability under Title VII and its wavier of sovereign immunity are limited to retaliation that rises to the level of a "personnel action," *i.e.*, an action relating to the terms, conditions, or privileges of employment.

(2003). That argument is tantamount to a policy objection to the line drawn by Congress for the statute's core anti-discrimination prohibition. As discussed above, Title VII proscribes a broad array of employment-related practices, but Congress stopped short of making any workplace interaction a basis for a potential lawsuit. See *Oncale*, 523 U.S. at 80. Moreover, the argument is based on the premise that Congress intended to adopt a broader concept of actionable discrimination to protect employees when discrimination is based on protected conduct than when discrimination is based on race or sex. Balancing the competing concerns of rooting out discrimination and keeping litigation within appropriate bounds, Congress declined to adopt an "any differential treatment" standard under Title VII's basic prohibition for discrimination on account of race, sex, or another prohibited factor. Neither the Act nor its objectives supports the contention that Congress believed that employees should enjoy greater protection when it came to the complementary prohibition against retaliation.

Furthermore, there is no evidence that the existing anti-retaliation provision has failed to encourage employees to file Title VII charges or otherwise engage in protected conduct. To the contrary, retaliation filings nearly doubled from 1992 to 2005 and a quarter of all Title VII charges now include claims of retaliation. See EEOC, *Charge Statistics FY 1992 Through FY 2005* (last modified Jan. 27, 2006) <http://www.eeoc.gov/stats/charges.html.> In any event, this is a policy determination for Congress. If Congress were to determine that a lower discrimination threshold were necessary to ensure that employees took advantage of remedial mechanisms, it could enact such a threshold. But, as currently enacted, Title VII is best read as establishing the same threshold for both outright discrimination and retaliation claims.

C. Like Title VII's Core Prohibitions, The Anti-Retaliation Provision Proscribes Any Discrimination That Amounts To A Materially Adverse Employment Action

Title VII adopts the same threshold for discrimination on the

basis of engaging in protected activity under Section 2000e-3(a) that it does for direct discrimination under Section 2000e-2: to prevail, a plaintiff must show that she has been subjected to a materially adverse employment action.

1. To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate that "(1) she engaged in protected conduct under Title VII; (2) she suffered an adverse employment action; and (3) the adverse action was causally connected to the protected activity." *Marrero* v. *Goya of P.R., Inc.*, 304 F.3d 7, 22 (1st Cir. 2002). As the Third Circuit has explained, in developing the adverse employment action requirement, "[c]ourts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Robinson*, 120 F.3d at 1300. Numerous circuits, including the court of appeals below, have thus held that an employee must show a materially adverse change in the terms, conditions, or privileges of employment to satisfy the adverse action element of the prima facie case. See Pet. App. 13a, 18a.[6]

2. That approach squares with this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). In *Ellerth*, the Court held that an employer may be vicariously liable for sexual harassment committed by a supervisor when the supervisor "takes a tangible employment action against the subordinate." *Id.* at 760. The Court explained that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Moreover, the Court drew support for "[t]he concept of a tangible employment action" from case law applying the materially adverse employment ac-

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[6] See also, *e.g.*, *Fairbrother* v. *Morrison*, 412 F.3d 39, 56 (2d Cir. 2005); *Marrero*, 304 F.3d at 23-27; *Von Gunten*, 243 F.3d at 866; *Gupta* v. *Florida Bd. of Regents*, 212 F.3d 571, 587-588 (11th Cir. 2000), cert. denied, 531 U.S. 1076 (2001); *Ribando* v. *United Airlines, Inc.*, 200 F.3d 507, 510-511 (7th Cir. 1999); *Robinson*, 120 F.3d at 1300.

tion standard. *Ibid.* (citing, *e.g.*, *Crady* v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).

The Court explained that "[a] tangible employment action in most cases inflicts direct economic harm," *Ellerth*, 524 U.S. at 762, and that a tangible employment action may include "a discharge, demotion, or undesirable reassignment," *id.* at 765. In addition, the Court contrasted case law in which courts had concluded that an employee's "bruised ego" or "reassignment" without any materially significant disadvantage did not constitute actionable discrimination. See *id.* at 761 (citing *Flaherty* v. *Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994); *Kocsis* v. *Multi-Care Mgmt., Inc.*, 97 F.3d 876 (6th Cir. 1996); *Harlston* v. *McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994).

Ellerth also resolved the rule of vicarious liability that applies to sexual harassment committed by a supervisor that does not result in a tangible employment action. After reaffirming that a plaintiff in such a case must show that the supervisor's actions are sufficiently "severe or pervasive," to constitute a "hostile work environment," 524 U.S. at 754, the Court adopted the following rule of vicarious liability for such cases: An employer is liable for the supervisor's conduct, unless it establishes as an affirmative defense "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

Thus, *Ellerth* recognizes two types of discrimination under Title VII's core prohibition: (1) "tangible employment actions," with respect to which the "employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII"; and (2) a "hostile work environment" that is based on "a showing of severe or pervasive conduct" and thus "constitute[s] discrimination in the terms or conditions of employment." 524 U.S. at 753-754. A plaintiff who can show that she has been subjected to either type of employer-related conduct has suffered a materially adverse employment action that,

if done on account of the filing of a Title VII charge or other protected activity, would constitute actionable discrimination under Section 2000e-3(a). See Pet. App. 14a (relying on *Ellerth* in explaining materially adverse employment action standard).[7]

3. The materially adverse employment action test not only follows the path marked by *Ellerth*, but provides a workable, objective, and uniform standard for adjudicating both direct discrimination and retaliation claims under Title VII. Under the materially adverse action standard, an employer's conduct must cause "objectively tangible harm" to be actionable, and thus "[p]urely subjective injuries, such as dissatisfaction with a reassignment, * * * public humiliation or loss of reputation" would not qualify as a matter of law. *Forkkio* v. *Powell*, 306 F.3d 1127, 1130-1131 (D.C. Cir. 2002). Such purely subjective injuries do not alter the terms and conditions of employment, and thus, would not qualify as actionable discrimination under Section 2000e-2(a)(1). In addition, a subjective standard would be more difficult to apply and could produce different results from the same action depending on the idiosyncracies of a particular plaintiff.[8]

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[7] Because *Ellerth* resolved only the question of when an employer is vicariously liable for sexual harassment committed by a supervisor outside the scope of his employment, it did not necessarily resolve the full substantive reach of Title VII's core prohibitions. Nevertheless, the Court's decision furnishes an instructive description of the type of employment-related discrimination that is actionable under Title VII. As explained in Part D below, the discriminatory acts found by the jury in this case constitute tangible employment actions and, therefore, satisfy the materially adverse action test.

[8] The objective nature of the inquiry is consistent with the lower court case law cited in *Ellerth*. See 524 U.S. at 761. For example, in *Flaherty*, the court of appeals observed that "a plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action." 31 F.3d at 457; see also *Kocsis*, 97 F.3d at 886 (noting that an employee's change in title would not be materially adverse where there was no significant change in responsibilities). The test that this Court applies in determining whether an employee has been subjected to a hostile work environment incorporates a subjective component, in that—in

D. The Court Of Appeals Correctly Held That The Retaliatory Acts At Issue Constitute Actionable Discrimination

The court of appeals held that the jury was entitled to find that each of the discriminatory practices at issue in this case constitute materially adverse employment actions that are actionable under Section 2000e-3(a). That conclusion is supported by the record and the reasonable inferences that a court is required to draw from the evidence in favor of the non-movant (here, respondent) in reviewing a motion for judgment as a matter of law. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); Pet. App. 8a.

1. Respondent's 37-day suspension without pay clearly constituted a tangible employment action that significantly changed her employment status. For 37 days, respondent was not permitted to work, she was denied any pay or benefits, and she did not know when, if ever, she could return to work. See Pet. App. 6a, 111a, 119a. For those 37 days, there was unquestionably a significant change in respondent's employment status. Although respondent was later reinstated with back pay, that affects only the appropriate remedy for the retaliatory suspension. See *id.* at 23a. It does not change the fact that respondent's employment status was significantly altered during the 37-day suspension. The suspension without pay therefore constituted a materially adverse employment action that is actionable discrimination under Title VII.

Petitioner also contends (Br. 33-38) that the suspension was not an official company act for which it is vicariously liable under this Court's decisions in *Ellerth* and *Suders*. That is incorrect. As discussed, *Ellerth* held that an employer is vicariously liable for the act of a supervisor when the supervisor takes a tangible employment action against a subordinate. 524 U.S. at 760. In

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addition to proving an "objectively hostile or abusive work environment"—a plaintiff must prove that she "subjectively perceived the environment to be abusive." See *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). However, even in that context, an allegation of subjective injury is insufficient, standing alone, to establish an actionable claim of discrimination under Title VII.

Suders, the Court reaffirmed that a company may be held vicariously liable for the "tangible employment actions" of supervisors. 542 U.S. at 144. Under *Ellerth* and *Suders*, because the action of the supervisor who suspended respondent without pay was a tangible employment action that could only have been taken by a supervisor, petitioner is vicariously liable for that suspension.

Petitioner also contends (Pet. 34) that it is not liable for the tangible action of suspending respondent without pay because its collective bargaining agreement makes the initial suspension tentative. But under *Ellerth*, an employer's vicarious liability for the act of a supervisor does not depend on whether a collective bargaining agreement characterizes a supervisor's tangible employment action as an action of the company, or whether that tangible action is said to be tentative or final. Instead, as a matter of law, if an action taken by a supervisor rises to the level of "a tangible employment action," it "becomes for Title VII purposes the act of the employer." 524 U.S. at 762. That understanding is consistent with this Court's statement in *Suders* that a "tangible employment decision * * * may be subject to review by higher level supervisors." 542 U.S. at 144-145 (citation omitted).[9]

The contention that an employer may avoid liability by labeling a supervisor's decision tentative and subjecting it to internal review also cannot be reconciled this Court's statute-of-limitations cases. Those cases hold that Title VII's statute of limitations begins to run when a discriminatory act occurs and that a discriminatory act is not rendered nonfinal by a mechanism for

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[9] Nor is there any force to petitioner's argument (Br. 38) that respondent should be denied a complete remedy under Title VII in order to promote the primacy of grievance procedures made available through collective bargaining. Because Congress expressly intended for Title VII remedies and grievance procedures under a collective bargaining agreement to be independent remedies, the Court long ago rejected the argument that it should qualify Title VII's protections in light of such grievance procedures. *International Union of Elec. Workers* v. *Robbins & Myers*, 429 U.S. 229, 235-238 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52, 54 (1974).

internal review. See *International Union of Elec. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976); *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 261 (1980). Indeed, in *Robbins & Myers*, 429 U.S. at 234, the Court rejected the argument that an employee's termination was not "final" until the conclusion of an internal grievance process, explaining that the employee "stopped work" the day she was fired and "ceased receiving pay and benefits as of that date." Likewise, in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 (2002), the Court stated that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'"

Petitioner argues (Br. 36) that Congress could not have intended a suspension without pay to be actionable when an employer reinstates the employee with backpay on the ground that there was no relief in that situation before the 1991 Amendments to Title VII. That is incorrect. Before 1991, a plaintiff in such a case could have sought interest for the time backpay was withheld, *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and an injunction to "bar like discrimination in the future." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Moreover, the 1991 Amendments reflect Congress's judgment that previous remedies were inadequate and that permitting victims of employment discrimination to recover compensatory relief for harm caused by an unlawful employment practice is necessary to further Title VII's deterrent and make-whole purposes. If employers were permitted to avoid liability for the tangible employment actions of their supervisors, that congressional judgment would be thwarted.

Petitioner asserts (Br. 39-40) that its supervisors must have authority to suspend without pay employees who violate work and safety rules. But employers also need the authority to fire and demote employees, and no one would argue that such actions are not covered by Title VII. Nothing in Title VII removes a supervisor's authority to suspend without pay (or fire or demote). Rather, Title VII limits a supervisor's authority to suspend an employee without pay (or fire or demote) only when the supervisor does so because of a prohibited factor, such as race, or for having engaged in a protected activity. When, as here, a supervi-

sor nonetheless suspends an employee without pay on one of those prohibited grounds for a significant period of time, Title VII, as interpreted in *Ellerth*, makes the employer liable.

2. Although it is a closer question, the court of appeals also properly concluded that a reasonable juror could have found respondent's transfer from her forklift duties to be a materially adverse employment action. Pet. App. 25a.

The general rule is that "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Brown* v. *Brody*, 199 F.3d 446, 455-456 (D.C. Cir. 1999) (internal quotation marks omitted). But substance does matter. Even when a transfer does not result in a change in pay or benefits, courts have recognized that it may amount to a materially adverse employment action when it entails a "significant change in job responsibilities," or significantly different working conditions such that a reassignment in form, is a demotion in substance. *Forkkio*, 306 F.3d at 1131; see *Jones* v. *District of Columbia Dep't of Corrs.*, 429 F.3d 276, 281 (D.C. Cir. 2005) (jury may find actionable discrimination based on such a transfer if plaintiff establishes "some other *materially adverse* [employment] *consequence*") (citation omitted); *Von Gunten*, 243 F.3d at 868 ("If the change in [the plaintiff's] job assignment truly had been significant, * * * then her contention would have merit."); *Kocsis*, 97 F.3d at 886 (employee did not suffer a "materially adverse employment action" where she enjoyed the same pay and benefits and "her duties were not materially modified"); *Harlston*, 37 F.3d at 382 (same). Likewise, in *Ellerth* this Court specifically recognized that an employee's "reassignment with significantly different responsibilities" constitutes a "tangible employment action." 524 U.S. at 761, 765.

Viewing the facts in the light most favorable to respondent, a reasonable juror could have found that she suffered a materially adverse employment action when petitioner changed her duties from operating the forklift to a standard track laborer position. The court of appeals stated that "the forklift operator position required more qualifications." Pet. App. 25a. In addi-

tion, testimony in the record indicated that "the forklift job was not merely an occasional task; it was an actual job which, according to Roadmaster Brown's own testimony, was advertised to the railroad employees." *Id.* at 106a (Clay, J., dissenting from panel decision). Thus, the court of appeals stated that, "[i]n essence, as the district court found, the reassignment was a demotion." *Id.* at 25a; see *id.* at 106a-107a (Clay, J., dissenting from panel decision) ("[Respondent], in effect, experienced not a mere 'lateral transfer,' * * * but a demotion"). As such, a reasonable juror could have found that, while respondent's pay, benefits, and job title remained the same, she was subjected to a "significant change in job responsibilities" (*Forkkio*, 306 F.3d at 1131).

Petitioner contends (Br. 25) that respondent was not reassigned at all, because respondent remained in the Maintanence of Way position to which she had been initially assigned, and the job description for that position included track laborer duties. That argument should be rejected. Just as the fact that an employee's pay and benefits remain the same does not automatically lead to the conclusion that she has not suffered a materially adverse employment action, the fact that her position or job description remains the same does not inevitably lead to that conclusion either. Rather, as discussed, an employee may establish a materially adverse employment action by proving that she has been subjected to a "significant change in job responsibilities." *Forkkio*, 306 F.3d at 1131. Nor does it matter (Pet. Br. 28-29) that during the period of her assignment to forklift duties, respondent sometimes performed track work. A jury could find that she suffered "a significant change in [her] job responsibilities," and thus actionable discrimination, when her primary responsibilities changed from operating a forklift to manually repairing railroad tracks.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2006

No. 05-259

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters (BMWE) file this brief *amici curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-

[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

CIO is a federation of 52 national and international labor organizations with a total membership of 9 million working men and women. The BMWE is a labor organization representing 31,000 maintenance of way employees on railroads throughout the United States.

STATEMENT

This case involves claims of retaliation in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* The claimant is Sheila White, who worked as a maintenance of way employee at the Burlington Northern & Santa Fe Railway's Tennessee Yard and who was covered by a collective bargaining agreement between Burlington Northern and the Brotherhood of Maintenance of Way Employes (BMWE).

In September 1997, White complained to the roadmaster of Burlington Northern's Tennessee Yard (an upper level Railway supervisor) and to other Railway officials that her immediate supervisor was sexually harassing her. Pet. App. 4a. Shortly thereafter, White was reassigned from operating a forklift to performing road work as a standard track laborer. *Ibid.* The road work performed as a standard track laborer is less skilled, more arduous and dirtier than the work of operating a forklift. *Ibid.*

In October and December 1997, White filed charges with the Equal Employment Opportunity Commission alleging sex discrimination and retaliation in violation of Title VII. Pet. App. 5a. Shortly after filing the second set of charges, White was "removed from service" at the direction of the roadmaster of the Tennessee Yard on a charge of insubordination. *Id.* at 6a.

White challenged her removal from service through the complaint and grievance-arbitration procedures of the Burlington Northern/BMWE collective bargaining agreement

covering the Tennessee Yard. *Id.* at 7a. White also filed charges with the EEOC alleging that the Railway's action constituted retaliation. *Ibid.*

In January 1998, the hearing officer considering White's challenge to her removal from service pursuant to the procedures in the collective bargaining agreement found that White had not been insubordinate and should not have been removed from service. *Ibid.* As a result, White was returned to her standard track laborer position with back pay. *Ibid.*

White subsequently brought suit against Burlington Northern alleging sex discrimination and retaliation in violation of Title VII. Pet. App. 7a. A jury found that White's reassignment from the forklift operator position to the standard track laborer position and her removal from service were in retaliation for her complaints about sexual harassment and for her filing of charges with the EEOC. *Ibid.* The jury awarded White $43,500 in compensatory damages (including $3,250 in medical expenses) on her retaliation claims. *Ibid.* The jury's verdict was sustained by the district court on Burlington Northern's motion for judgment and by the Sixth Circuit on the Railway's appeal from the district court's ruling. *Ibid.*

SUMMARY OF ARGUMENT

Burlington Northern was found to have unlawfully discriminated against its employee, Sheila White, in violation of Title VII § 704(a) by reassigning White to a worse job and by later removing her from service. In this Court, the Railway defends by maintaining that a retaliatory reassignment to a worse job is not an adverse employer action that will support a Title VII discrimination claim and that the retaliatory removal from service was not an action attributable to the Railway. Those defenses fail.

(1) By their clear terms, Title VII's anti-discrimination provisions prohibit all employer actions that adversely affect an employee's conditions of employment taken against the

employee on the basis of (i) the employee's "race, color, religion, sex, or national origin," or (ii) the employee's opposition to unlawful discrimination. This reading of Title VII's anti-discrimination provisions is reinforced by the legislative history of the Act and by the long-standing reading of the National Labor Relations Act's and the Fair Labor Standards Act's parallel anti-discrimination provisions. Thus, the employer action of reassigning an employee to a worse job in retaliation for opposing sex discrimination and for filing charges with the EEOC constitutes unlawful discrimination in violation of Title VII §704(a).

(2) The retaliatory removal of White from service is adverse employment action for which Burlington Northern is responsible. The removal from service was ordered by an upper level Railway supervisor with authority to take such actions on behalf of the Railway. The fact that White successfully challenged the removal from service through the complaint and grievance-arbitration procedures in the applicable collective bargaining agreement does not relieve the Railway of responsibility for removing White from service in the first place, an action that resulted in her being without her sustaining income in the interim.

ARGUMENT

In this case, after a full trial, the jury found that Burlington Northern violated § 704(a) of Title VII by reassigning its employee, Sheila White, to a worse job and later removing her from service in retaliation for her complaints of sexual harassment and her filing of EEOC charges, and the jury's findings were sustained by the district court and by the *en banc* Sixth Circuit.

In this Court, Burlington Northern offers two legal defenses to White's retaliation claims. First, the Railway argues that the retaliatory reassignment of White to a worse job is not an adverse employer action that will support a Title VII discrimination claim. Pet. Br. 24-32. Second, the Railway

argues that since the applicable collective bargaining agreement provided employees a procedure through which they could challenge a removal from service, the removal of White from service was a mere preliminary action that cannot properly be attributed to the Railway, and that the decision upholding White's challenge to her removal is the only action that is properly attributable to the Railway. *Id.* at 33-42. Neither of these defenses has any legal substance.

A. Four Red Herrings.

Before taking up each of Burlington Northern's defenses—and with apologies to Dorothy L. Sayers—we begin by removing (a mere) four red herrings that might distract from a properly focused consideration of the issues before the Court at this stage of the proceedings.

First, at this juncture, this case does not present any question as to whether White had presented a sufficient *prima facie* case on her retaliation claims. White's case went to trial, and the jury—considering all of the evidence, including the Railway's proffer of a pretextual justification for her job reassignment, *see* Pet. App. 25a-26a—found that Burlington Northern had first reassigned White to a worse job and then removed her from service in retaliation for her complaints of sexual harassment and her filing of charges with the EEOC. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 & 147 (2000). Thus, this case is not one that turns on the debatable proposition that, at the *prima facie* case stage, only certain kinds of adverse employment actions are sufficient, in and of themselves, to raise an inference of retaliatory motive. *See* White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1142 (1998) ("courts requiring adverse action only for a prima facie case presumably do so because plaintiff has failed to raise an inference of unlawful intent, not in the face of an assumed or proven motivation").

Second, there is no question that Burlington Northern itself is directly responsible for reassigning White to a worse job and for removing her from service. Both actions were found to have been carried out at the direction of the roadmaster for the Railway's Tennessee Yard, who acted within the scope of his authority as the upper level Railway supervisor at that facility. Pet. App. 4a & 6a. Title VII defines the term "employer" to include "any agent" of an employer. 42 U.S.C. § 2000e(b). And, an employer's upper level supervisor exercising his supervisory authority to reassign a subordinate employee to a worse job or to remove such an employee from service is most certainly acting as an agent of the employer. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762-763 (1998) ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates," and thus "a tangible employment action taken by a supervisor becomes for Title VII purposes the act of the employer.").

Third, there is no question that the retaliatory reassignment to a worse job and the retaliatory removal from service at issue here related to White's terms, conditions and privileges of employment. Thus, this case does not raise any issue of whether Title VII § 704(a) (which prohibits retaliatory "discriminat[ion] against any . . . employee[]") also reaches employer actions that are *unrelated* to employment and whether §704(a) is, in that sense, broader than Title VII §703(a)(1) (which prohibits racial and sexual "discriminat[ion] against any individual with respect to his . . . conditions . . . of employment"). *See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). (construing the similar anti-retaliation provision in the National Labor Relations Act to reach baseless retaliatory lawsuits).

Fourth, Burlington Northern's defense regarding White's removal from service does *not* implicate the question of whether White is precluded by the grievance-arbitration procedures of the applicable collective bargaining agreement

from pursuing her Title VII claim in court. It is, to begin with, far from clear that a collective bargaining agreement's grievance-arbitration provision can ever constitute a waiver of a covered employee's right to pursue a Title VII claim in court. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974). But even assuming that it could, in order to effectively waive such rights "the collective-bargaining agreement" would have to "contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998). The applicable collective bargaining agreement here contains *no* such clear and unmistakable waiver. As a general matter, collectively bargained grievance-arbitration procedures in the railroad industry "pertain[] only to disputes invoking contract-based rights." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254 (1994). And, the collective bargaining agreement here is within that standard mode, making not the slightest reference to the arbitration of statutory claims.

With those potential distractions put to one side, we now return to the separate defenses offered by Burlington Northern to White's separate claims of unlawful retaliation.

B. The Retaliatory Reassignment Claim.

Burlington Northern argues that the Railway's retaliatory reassignment of White as a standard track laborer performing road work is not an adverse employer action that will support a Title VII discrimination claim. Pet. Br. 24-32.

In advancing this argument, Burlington Northern does not contest the findings of the jury, sustained on appeal, that the road work performed by a standard track laborer is less skilled, more arduous and dirtier than operating a forklift. *See Exxon Co, U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("concurrent findings of fact by two courts below" will not be reviewed "in the absence of a very obvious and exceptional showing of error"). Indeed, the Railway's explanation for

reassigning White from operating the forklift to performing road work—an explanation found to be pretextual by the jury—was that employees with more seniority than White complained about her having been assigned to the more desirable forklift operator job. Pet. App. 4a-5a.

Rather, the Railway's argument is that retaliatory reassignments to a worse job that entails performing less skilled, more arduous and dirtier work—in contrast to retaliatory reassignments to a lower paying job or to a lower classified job—do not constitute unlawful "discrimination" within the meaning of Title VII. Pet. Br. 27. That artificial limitation on what constitutes Title VII "discrimination" is unsound.

Section 703(a)(1) of Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). And, § 704(a) makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . ., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

It is evident, then, that the phrase "discriminate against" should be accorded the same meaning in both § 703(a)(1) and § 704(a). *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (normally "identical words used in different parts of the same act are intended to have the same meaning").[2]

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[2] So that we are not misunderstood, this is not to say that, in light of their different terms and regulatory purposes, the two provisions are identical in scope regarding adverse employer actions that are unrelated to the employee's conditions of employment. *See* p. 6, *supra* (third red herring). But since this case does involve adverse employer action related to White's conditions of employment, any such difference in scope is not at issue here.

Indeed, the Railway embraces—and belabors for many pages of its brief—this basic point. Pet. Br. 13-21.

In common usage, the word "discriminate" means "[t]o make a clear distinction: differentiate" or "[t]o act on the basis of prejudice." *Webster's II: New College Dictionary* 325 (1999). And, this is precisely the meaning attributed to that word by the sponsors of Title VII. Thus, Senator Clark, one of the Senate floor managers in 1964, responded to an inquiry from Senator Dirksen, the Senate minority leader, concerning the meaning of the word "discriminate" as follows:

> "To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin); any other criteria or qualification is untouched by this bill." 110 Cong. Rec. 7218 (1964).

Senator Clark added that "[d]iscrimination is a word which . . . has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act." 110 Cong. Rec. 7218 (1964). At the time Senator Clark made this comparison, the word "discriminate" had a well-established meaning under the NLRA and the FLSA that accorded with the common sense meaning attributed to that word by Senator Clark.

In this regard, NLRA § 8(a)(3) makes it "an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). And, NLRA § 8(a)(4) makes it "an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4). These two sections of the NLRA are thus worded similarly to §§ 703(a)(1) and 704(a) of Title VII.

From the beginning, the National Labor Relations Board has explained the prohibition on discrimination contained in NLRA § 8(3)—the predecessor to § 8(a)(3)—in the following terms:

> "As interpreted by the Board, this section is not intended to interfere generally with the freedom of an employer to hire and discharge as he pleases. It limits this freedom, however, in one important respect. He may not use it in such a manner as to foster or hinder the growth of a labor organization. He may employ anyone or no one; he may transfer employees from task to task within the plant as he sees fit; he may discharge them in the interest of efficiency or from personal animosity or sheer caprice. But, in making these decisions he must not differentiate between one of his employees and another, or between his actual and his potential employees, in such a manner as to encourage or to discourage membership in a labor organization." *First Annual Report of the NLRB* 77 (1936).

The Board has therefore held that "assigning [union member employees] more onerous and less agreeable work" constitutes "discriminat[ion] against" those employees "in violation of Section 8(a)(1) and (3) of the Act." *Park Inn Hotel, Inc.*, 139 NLRB 669, 685 (1962). *See also Meyer & Welch, Inc.*, 96 NLRB 236, 244 (1951) (Reassignment to "dirty, disagreeable, more onerous, and less desirable" job constituted "discrimination" within the meaning of NLRA § 8(a)(3) & (4), even though the reassignment "resulted in no reduction in wage rates, change in hours of work, or other conditions of employment."). As the Board has stressed, it is "the operative factors which prompted the discrimination," and not the "degree of the [employer's] discrimination," that is determinative in § 8(a)(3) cases. *Ontario Foods, Inc.*, 144 NLRB 1057, 1059 (1963).

FLSA § 15(a)(3), that Act's anti-discrimination provision, had been interpreted in the same manner.[3] For example, in *Mitchell v. DeMario Jewelry, Inc.*, the district court found that the employer violated FLSA § 15(a)(3) by "discriminating against [FLSA-plaintiff] employees . . . in several ways including the changing of seating arrangements of the[] employees . . ., giving them less desirable locations or positions in the plant, changing the particular type of work assigned to them, giving instructions that they were not to leave their seats except to go to the restroom and generally finding fault with their work." 180 F.Supp. 800, 801-802 (M.D. Ga. 1957), *aff'd on other grounds*, 361 U.S. 288 (1960).

This Court has often "drawn analogies to the NLRA in [construing] Title VII," and "[t]he meaning of this analogous language [in the NLRA] sheds light on the Title VII provision at issue here." *Hishon*, 467 U.S. at 76 n. 8. Reading Title VII against the background provided by the settled interpretation of the NLRA's anti-discrimination provisions (as well as the FLSA anti-discrimination provision), it is clear that what both the NLRA and Title VII prohibit is for an employer to "differentiate between one of his employees and another" on an improper basis in taking such employer actions as "transfer[ring] employees task to task" or "discharging" employees. *First Annual Report of the NLRB*, 77.

There can be no doubt, then, that it would be unlawful "discrimination" under § 703(a)(1) for an employer, on the basis of "race, color, [and] sex," to refuse to assign racial minorities and women to a better job, like the folk lift operator job, and to assign them only to worse jobs, like the less

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[3] FLSA § 15(a)(3) makes "it unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3).

skilled, more arduous and dirtier standard track laborer's road work job. *See Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("An employer may provide its employees with many benefits that it is under no obligation to furnish," but such "benefit[s] . . . may not be doled out in a discriminatory fashion."). It follows ineluctably that making such assignments on the basis that an employee has complained about sexual harassment or filed EEOC charges does constitute unlawful "discrimination" in violation of § 704(a).

Simply stated, "assigning [employees] more onerous and less agreeable work" on an improper basis is most certainly unlawful "discrimination against" those employees. *Park Inn Hotel*, 139 NLRB at 685. In that regard, the jury's findings that White's reassignment was in retaliation for her complaints about sexual harassment and her filing of EEOC charges and that the reassignment worked "a materially adverse change in the terms or conditions of employment," JA 63, is more than sufficient to establish that Burlington Northern unlawfully "discriminate[d] against" White in violation of § 704(a).

C. The Retaliatory Removal from Service Claim.

Burlington Northern argues, too, that "White's temporary removal from service . . . is not actionable" on the ground that "[t]he initial investigatory suspension was not the official decision of the company under the terms of the CBA, and the action that is properly attributable to the company—*viz.*, rescinding the suspension and awarding back pay—did not adversely affect the compensation, terms, conditions or privileges of White's employment." Pet. Br. 33-34. In other words, Burlington Northern's position is that the only action attributable to the Railway is rescinding White's "removal from service" with back pay and that the action of wrongfully removing White from service and leaving her without her sustaining income in the interim, thereby causing her over

$40,000 in compensatory damages, is attributable to some nameless third party.

To begin, no matter how a collective bargaining agreement is drafted, the agreement's terms cannot override the Title VII rule that when a supervisory agent of an employer—acting within the scope of his authority as such—unlawfully discriminates against an employee in violation of Title VII, the *employer* has committed "an unlawful employment practice." That self-evident proposition is fully sufficient to refute Burlington Northern's attempt to evade legal responsibility for the retaliatory removal of White from service. And, beyond that, the applicable collective bargaining agreement does not attempt to override Title VII in the manner asserted by the Railway.

The basic premise of Burlington Northern's defense is the fiction that "the railroad and the union have agreed upon a procedure for the railroad to investigate any tentative disciplinary action," which is "separate and apart from—and prior to—the invocation of grievance procedures." Pet. Br. 5 & 6. Starting from this fiction, the Railway reasons that it cannot be deemed to have taken any adverse action against an employee until that procedure is completed. This syllogism fails at its first step, because the Railway's premise is wrong.

What the applicable collective bargaining agreement in fact provides is a procedure by which "[a]n employe who . . . has been . . . disciplined or dismissed" can lodge a "complaint" that she "has been unfairly disciplined or dismissed, or [otherwise] unjustly treated." Rule 91(b), JA 56. If a "disciplined or dismissed" employee does not file a "complaint" challenging the Railway's action "within 15 days from date of discipline, dismissal or alleged unjust treatment," she is foreclosed from challenging the action through the procedures provided by the collective bargaining agreement. Rule 91(b)(1) & (8), JA 56-57.

Thus, where, as here, the discipline takes the form of "removal from service," an employee's failure to file a timely complaint means that the "removal from service" will be permanent, i.e., the employee is permanently dismissed from Burlington Northern's employment. Pet. App. 6a ("the suspension without pay would automatically become a termination if White did not file a grievance with her union appealing the decision within fifteen days") & 119a ("evidence at trial showed that the suspension was without pay and that termination would have resulted but for the intervention of the union").

The applicable collective bargaining agreement further provides that—where an employee does complain—in "the handling of his complaint," the "employe may be represented by [a] duly accredited representative of the Brotherhood of Maintenance of Way Employes." Rule 91(b)(3), JA 56. As part of the "fair and impartial investigation" into the employee's complaint, the employee (and the union on the employee's behalf) has the right to present witnesses before an employer-appointed hearing officer, who will decide whether to sustain the charges on which the discipline was based. Rule 91(b)(3) & (5), JA 56-57.

The collective bargaining agreement adds that the decision of a hearing officer on an employee complaint alleging unjust or unfair discipline may be appealed through the normal procedures for resolving grievances under the agreement. Rule 91(b)(7) & (8), JA 57. The appeal through the grievance-arbitration procedures is based on the record established before the employer-appointed hearing officer on the investigation into the employee's complaint. *See* Rule 1(d), National Railroad Adjustment Board Uniform Rules of Procedure (June 23, 2003), available at www.nmb.gov. And, "the hearing officer" is charged with being "unimpeachably objective and unbiased in the development of fact." NRAB

Third Division Award No. 20014 (1973), available at www.nmb.gov.

"The [National Railroad Adjustment] Board does not conduct an evidentiary hearing but reviews an administrative record that is created during the grievance handling procedure set forth in the applicable collective bargaining agreement. In discipline cases, the record generally includes a fully transcribed hearing with witnesses and documentary evidence presented before a carrier official acting as the hearing officer." Abram, *et al.*, eds., *The Railway Labor Act* 407 (2d ed. 2005) (footnote omitted).

The sum of the matter is this: What the applicable collective bargaining agreement provides is a procedure by which "[a]n employe who . . . has been . . . disciplined or dismissed" may file a "complaint" challenging that action by Burlington Northern. Contrary to the Railway's brief, the agreement does *not* speak in terms of "tentative disciplinary action." Pet. Br. 5. Rather, the agreement speaks in terms of "discipline[]" that "has been" imposed. Moreover, the Railway's assertion that the "procedure . . . to investigate" a complaint of unjust discipline is "separate and apart from" the "grievance procedures," Pet. Br. 6, is seriously misleading. The investigation is an essential first step in the grievance procedure during which the record is established for all subsequent steps, including arbitration. Because "[s]ubsequent post-hearing phases proceed . . . based on the record established during the on-property [investigative] stage," those phases "closely resemble an appellate proceeding." *The Railway Labor Act* 407-408.

Finally, to put the forgoing in perspective, it is noteworthy that the procedure established by the applicable collective bargaining agreement is not typical of the railroad industry or even of the other agreements between Burlington Northern and the BMWE. The norm in the industry is that, absent a safety hazard or gross misconduct (of a kind plainly not

present in this case), an employee may *not* be removed from service until *after* the employee has been given written notice of the specific charges against him and *after* a decision has been rendered on the basis of a "fair and impartial investigation" into those charges. *See* NRAB Third Div. Award No. 21447 (1977), available at www.nmb.gov. The applicable collective bargaining agreement stems from an agreement the BMWE negotiated with the St. Louis-San Francisco Railway before that railroad merged with the Burlington Northern. By contrast, the collective bargaining agreement covering the core segment of the workforce—i.e., the agree

ment originally negotiated between the BMWE and the Burlington Northern Railway—contains removal from service requirements that are in line with the industry norm. *See* Special Board of Adjustment No. 1112 Award No. 60, pp. 6-7 (2003).[4]

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[4] Rule 40 of that agreement provides in pertinent part:

> A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.
>
> B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor.
>
> C. At least five (5) days advance written notice of the investigation shall be given the employe and the appropriate local organization representative, in order that the employe may arrange for representation by a duly authorized representative or an employe of his choice, and for presence of necessary witnesses he may desire.

If the applicable collective bargaining agreement had followed the normal pattern, Burlington Northern would, in fact, not have taken any action to remove White from service until after a hearing officer rendered his decision on the basis of a fair and impartial investigation. At the same time, if the agreement here had followed the normal pattern, White would not have been subject to removal from service until a hearing officer decision was rendered, and she would not have been out of work or without income pending the decision.

The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employe involved.

D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employe, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employe. If not effected within five (5) calendar days, or if employe is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.

E. The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.

F. The investigation provided for herein may be waived by the employe provided that any discipline assessed is confirmed in writing in the presence of his duly authorized representative and agreed to by the proper officer of the Carrier.

G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

CONCLUSION

The judgment of the courts below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

BURLINGTON NORTHERN
SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER BURLINGTON NORTHERN SANTA FE RAILWAY CO.

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QUESTION PRESENTED

Whether an employer may be held liable under section 704 of the Civil Rights Act of 1964 for assigning an employee duties within her job description, or for a temporary suspension rescinded with full back pay after the employer completed an investigation.

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In the
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BURLINGTON NORTHERN
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BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER BURLINGTON NORTHERN SANTA FE RAILWAY CO.

INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade organization representing the Nation's major freight railroads and Amtrak. AAR's freight

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the Association of American Railroads states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

members operate approximately 77% of the rail industry's line haul mileage, produce 95% of its freight revenues, and employ 93% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR believes that its familiarity with the railroad industry, and with the likely consequences of the Sixth Circuit's decision in this case, will aid this Court's understanding of the issues presented here.

The establishment of clear guidance on the scope of federal employment discrimination law is of substantial concern to AAR's members. Because railroad operations are by their nature decentralized and widely dispersed, AAR's members must rely on their supervisory personnel to oversee more than 180,000 rail employees and to ensure the safe and efficient operation of the Nation's railroads in the first instance. The Sixth Circuit's holdings below adversely affect the ability of AAR's members to vest that critical discretion in their supervisory personnel.

SUMMARY OF ARGUMENT

This Court explained in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), that an employer can be held vicariously liable for harassment by supervisory personnel that produces "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*'s reliance on the materiality of the challenged conduct should also guide this Court's resolution of the conflict in the lower courts over the threshold for actionable employer retaliation under Title VII. A supervisor's instruction to an employee to perform one set of tasks concededly within her job description, rather than a different set of tasks she preferred and had become accustomed to performing, is not a "tangible" adverse employment action.

This Court should also hold that an interim suspension that is subsequently vacated, with backpay, through the normal operation of an employer's internal decision-making process is not a "tangible" adverse employment action, especially where, as here, the parties understood that the employer would not render a final, official decision until after it concluded an investigation (or until the time for investigation had passed). Allowing employers a reasonable opportunity to perform such investigations or to "cure" otherwise-adverse actions would further Title VII's goal of fostering conciliation rather than litigation and encourage employers to adopt rigorous procedures for reviewing supervisory decisions.

Large interstate employers need clear and sensible rules in this area of the law so that they can strike an appropriate balance between the need to vest reasonable discretion and authority in front-line supervisors and the need to protect the company from costly employment litigation. The decentralized and widely dispersed nature of rail operations and the possibility of catastrophic accidents mean that railroads have a particularly strong need to delegate effective and immediate supervisory discretion to supervisors in the field. The Sixth Circuit's decision in this case makes it difficult and risky for a railroad to permit its supervisors to exercise ordinary supervisory authority over any employee who has ever complained about discrimination. That is not consistent with the goal of efficient and safe operation of the Nation's railroads.

ARGUMENT

I. THE SIXTH CIRCUIT SET TOO LOW A THRESHOLD FOR ACTIONABLE EMPLOYER "RETALIATION" UNDER TITLE VII

The standard for determining what kinds of employer decisions are sufficiently material and final to constitute an "adverse employment action" for purposes of a federal retaliation lawsuit is critically important to employers when

deciding how much authority supervisors can be permitted to exercise over employees who have previously made a discrimination complaint. If that threshold is set too low, or if even interim decisions can trigger a Title VII lawsuit even if they are later corrected through the normal operation of an employer's internal decision-making process, companies will have a strong incentive to require that any changes or disciplinary actions be approved by management or entrusted to a formal disciplinary process in the first instance. This case presents this Court the opportunity to resolve confusion in the lower courts over where that bar should be set.

The Sixth Circuit in this case set the bar far too low. In holding that a supervisor's direction to an employee to concentrate on performing tasks concededly within her job description, instead of other tasks she had become accustomed to performing, was an "adverse employment action" for purposes of a federal retaliation lawsuit, the Sixth Circuit failed to follow this Court's teachings in *Ellerth*. In holding that a supervisor's decision temporarily to suspend an employee for disciplinary reasons is an "adverse employment action"—even if the company declines officially to adopt the suspension and reinstates the employee with full backpay (and no interruption of benefits) after conducting an investigation—the Sixth Circuit failed to accord due weight to Title VII's goal of fostering conciliation rather than litigation. The Sixth Circuit's decision should be reversed.

A. Directing Employees To Perform Tasks They Were Hired To Do Is Not A "Tangible Employment Action"

In determining when an employer vicariously "discriminates" as a matter of law under Section 703(a) of Title VII, this Court in *Ellerth* "import[ed] the concept of a tangible employment action" from lower-court cases that it viewed as reflecting the prevailing understanding of the types of employer actions that constitute "adverse

employment actions." *Id.* at 761, 768 (citing *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).[2] This Court explained that "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates," that "[a] tangible employment decision requires an official act of the enterprise, a company act," and that an employer should be held liable for tangible employment actions because in taking such actions "[t]he supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Id.* at 762. This Court therefore held that an employer is only liable as a matter of law for supervisor harassment that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761.

Ellerth accordingly makes clear that not all supervisory actions are sufficiently adverse to constitute actionable employer "discrimination" under Title VII; instead, a plaintiff must allege some genuinely *concrete and material* adverse change in the terms of employment—a "tangible employment action"—in order to hold the employer liable as a matter of law.[3] This principle, which this Court recently

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[2] The lower courts are in agreement that in order to prove unlawful retaliation, a plaintiff must demonstrate (i) that she engaged in conduct protected by Section 704(a); (ii) that the employer took an "adverse employment action" against the plaintiff; and (iii) that the protected conduct was causally connected to adverse action, although some courts, echoing *Ellerth*'s language, "use the term 'tangible employment action' or some other variation for the same concept" set forth in the second requirement. Pet. App. at 10a n.1.

[3] This Court added that where the supervisor's conduct does not result in a "tangible employment action," the employee must allege a hostile work environment that is objectively "severe or pervasive" to

reaffirmed in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 144–45 (2004), should control this case as well. Both Sections 703(a) and 704(a) of Title VII, read *in pari materia*, prohibit employer "discrimination" as an "unlawful employment practice." 42 U.S.C. §§ 2000e-2(a), 3(a). Because "'Congress has not expressed a stronger preference for preventing retaliation under [Section 704(a)] than for preventing actual discrimination under [Section 703(a)],'" *Von Gunten v. Maryland*, 243 F.3d 858, 863 n.1 (4th Cir. 2001) (citation omitted), what constitutes actionable "discrimination" should be the same with the latter as it is with the former. Employers should be held liable as a matter of law for allegedly retaliatory actions taken by supervisors only when the action results in a genuinely concrete and material change in the terms and conditions of employment—a "tangible employment action."[4] The Sixth Circuit's decision in this case cannot withstand scrutiny under a reasonable application of this principle.

The Sixth Circuit's holding that an employer risks Title VII liability by instructing an employee to perform tasks concededly within her job responsibilities cannot be squared with *Ellerth*'s teaching that a "tangible employment action" constitutes "a *significant change in employment status*, such as hiring, firing, failing to promote, *reassignment with*

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constitute a constructive alteration of the terms and conditions of employment, and the employer may assert an affirmative defense to liability or damages that (i) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (ii) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765. This case does not present the question whether an employer may be held vicariously liable for retaliatory harassment not resulting in a "tangible employment action." *See* Pet. App. at 10a n.1.

[4] Indeed, the Sixth Circuit itself acknowledges the relevance of *Ellerth*'s teachings, noting that "[t]he terms 'tangible employment action' and 'adverse employment action' are interchangeable." *Keeton v. Flying J, Inc.*, 429 F.3d 259, 263 n.1 (6th Cir. 2005).

significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 761 (emphases added); *see also Suders*, 542 U.S. at 134 (a tangible employment action is "an employer-sanctioned adverse action *officially changing her employment status* or situation") (emphasis added). The rail supervisor's instruction to Respondent to focus on particular tasks that she was hired to perform, that she was already performing for a substantial part of the work day, and that were being performed by some of her more senior coworkers, was clearly nothing more than a task reassignment unaccompanied by any change in salary, hours, job category, or other term of her employment. *See* Joint Appendix ("JA") 58–61. Indeed, it is difficult to conceive how directing an employee to do what she was hired to do can amount to *any change*—let alone a "significant" one—to her employment status. As the Seventh Circuit has recognized, asking an employee to perform different *tasks* that are concededly within his or her current job classification cannot be an adverse change in the terms and conditions of his employment. *See Conley v. Vill. of Bedford Park*, 215 F.3d 703, 712 (7th Cir. 2000) (assigning maintenance employee to paint a pump room for an extended period of time was not an adverse employment action because "the assignment seems to be well within the scope of normal activities for a Village maintenance worker"). The bottom line, as the original Sixth Circuit panel correctly observed, is that:

> The railroad hired White as a track maintenance worker. One of her explicit job responsibilities was to maintain the railroad tracks. We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her.

Pet. App. at 96a. Directing an employee to do her job cannot be actionable retaliation, even if that employee has become accustomed to performing tasks she views as more desirable and to leaving the more onerous tasks to her

coworkers. That common-sense insight would have prevailed had the Sixth Circuit followed *Ellerth*'s teachings, and it should guide this Court's decision in this case.

Other federal courts of appeals have followed those teachings and have properly held, "[p]erhaps in recognition of the judicial micromanagement of business practices that would result if [courts] ruled otherwise," that "'changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes.'" *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999) (citation omitted) (alteration in original); *see, e.g.*, *Crady*, 993 F.2d at 136 (alleged "demotion" did not constitute an adverse employment action, where the employee "would have maintained a management-level position at the same salary and benefits he was already receiving," and there was no showing that the employee's new responsibilities "were less significant than the responsibilities he previously enjoyed"); *Harlston*, 37 F.3d at 382 ("Changes in duties or working conditions that cause no materially significant disadvantage" are insufficient.); *Flaherty*, 31 F.3d at 456; *Brown*, 199 F.3d at 455–56.

These courts also have correctly held that "[m]ere idiosyncracies of personal preference are not sufficient to state an injury" under federal antidiscrimination laws. *Brown*, 199 F.3d at 457. Instead, consistent with *Ellerth*'s teachings, they have required a showing "that the plaintiff has suffered objectively tangible harm." *Id.* Thus, an employee's perception that a reassignment "was more stressful" was insufficient to show discrimination, when the employee "suffered no diminution in her title, salary, or benefits." *Harlston*, 37 F.3d at 382; *see also, e.g.*, *Flaherty*, 31 F.3d at 457 ("[A] plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action."); *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.").

These courts correctly recognize that Title VII was "not intended to diminish traditional management prerogatives," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quotation omitted), and that requiring an employee to demonstrate an objectively material change in the terms of employment is necessary to ensure that employers and the courts are not inundated with federal lawsuits over trivial, day-to-day supervisory decisions. *See, e.g., Fairbrother v. Morrison*, 412 F.3d 39, 56–57 (2d Cir. 2005) (evaluation of "unsatisfactory" performance insufficient to show adverse employment action absent evidence that evaluation "negatively altered [the plaintiff's] compensation, benefits, or job title"); *Brown*, 199 F.3d at 458 (same); *cf. Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507–08 (5th Cir. 1988) (admonishing that employment laws were "not intended to be a vehicle for judicial second-guessing of employment decisions, nor . . . to transform the courts into personnel managers").

They also recognize that the ordinary operation of a business requires flexibility for supervisors in assigning—and from employees in performing—tasks to meet ever-changing needs. An increase in ridership, for example, may require a passenger rail company to reassign its employees to busier terminals, or an airline to transfer flight attendants from empty flights to full flights. Such routine and necessary adjustments may render an employee's work subjectively more "undesirable" but cannot be treated as materially adverse employment actions—especially where, as here, the parties' *ex ante* expectation is that such adjustments are one of the realities of the employment relationship.

The Sixth Circuit's holding assigns undue importance to the subjective perceptions of employees regarding the desirability of particular tasks they are assigned to perform. Indeed, it is far from self-evident that a "dirtier" and more physically demanding task is inferior to a cleaner and less tasking one. Just ask park rangers whether they would prefer a desk job. *See, e.g., Ramirez v. City of San Antonio*,

312 F.3d 178, 180 (5th Cir. 2002) (employer allegedly discriminated "by transferring [the plaintiff] to a less physically demanding position"). The Sixth Circuit's decision promises to inundate the courts with litigation over trivial disputes and otherwise ordinary workplace interactions that should not be the subject of federal civil rights actions.[5] This will enmesh employers in lengthy and costly litigation, in which they will often be unable to obtain judgments as a matter of law prior to trial because the lawsuits will inevitably turn on factual disputes about the supervisor's motive. Plaintiffs can easily allege, and juries can easily conclude, that a discriminatory intent motivated some resented request by a supervisor whenever the employee had previously made a complaint about alleged discrimination. The Sixth Circuit's decision imposes unwarranted litigation burdens on companies for "trivial personnel action that an irritable, chip-on-the-shoulder employee did not like." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).[6] And it effectively prevents employers from exercising even the most basic management prerogative over employees who have engaged in protected conduct. Title VII liability should not be premised solely on an employee's subjective dissatisfaction

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[5] Indeed, as the petition demonstrated, the number of retaliation charges filed with the Equal Employment Opportunity Commission doubled in the twelve years between 1992 and 2004. Pet. at 17 (citing EEOC, Charge Statistics FY 1992 Through FY 2004, *at* http://eeoc.gov/stats/charges.html (last modified Jan. 27, 2005)).

[6] Indeed, the Sixth Circuit's standard is hard to square with this Court's repeated holdings that sexual harassment does not alter the terms and conditions of employment unless it is sufficiently "severe" or "pervasive" to create an *objectively* "hostile or abusive work environment." *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). That standard was designed to identify workplace conduct that, although perhaps offensive, is not serious enough to justify federal litigation. If relentless sexual innuendo cannot be actionable as discrimination unless it renders the overall environment severely or pervasively hostile, it is not clear why much less harmful conduct should be actionable when it is alleged to be retaliatory.

with an employer's exercise of ordinary management prerogatives that did not result in any tangible detriment to the employee.

B. An Interim Suspension That Is Subsequently Corrected, With Backpay, Should Not Be Deemed A "Tangible Employment Action"

Respondent's supervisor temporarily suspended her without pay for alleged insubordination. Following the applicable collective bargaining agreement, the employer conducted an investigation at the employee's request and rendered a decision at the conclusion of the investigation. *See* Pet. App. at 6a–7a; Rule 91, Agreement Between St. Louis-San Francisco Railway Co. and its Employees represented by Brotherhood of Maintenance of Way Employees (eff. Aug. 1, 1978) ("BNSF CBA"), JA 56–57. That decision was to reverse the suspension, reinstate Respondent, and award full backpay for the 37 days she was suspended. The Sixth Circuit held that the employer could nevertheless be held liable under Title VII for the temporary suspension.

This Court recognized in *Ellerth* and its companion case, *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–07 (1998), that the broad language of Title VII deliberately entrusts this Court with discretion to fashion sensible rules that "promote conciliation rather than litigation," *Ellerth*, 524 U.S. at 764, and encourage employers to pursue prophylactic measures that minimize the need for judicial intervention. Reversing the Sixth Circuit's holding, declaring that decisions that are clearly preliminary and tentative under an employer's internal processes should not constitute actionable retaliation, and allowing employers a reasonable opportunity to cure otherwise-adverse employment actions under Title VII would further those goals.

The Sixth Circuit's holding that an employer cannot decide, after an appropriate investigation, whether to adopt or reverse a temporary suspension or reassignment

discourages internal efforts to identify and redress potential statutory violations without litigation. The Sixth Circuit correctly noted that an employee who is wrongly suspended and subsequently reinstated, with backpay, may nonetheless have suffered some inconvenience and expense. But that is a small price to pay for a rule that encourages employers to seek out and confess nascent errors, and saves all parties and the federal courts the burden of litigation. Indeed, the Sixth Circuit's holding perversely punishes employers for maintaining rigorous internal review procedures, because a full reinstatement with backpay will no doubt be interpreted by a subsequent jury as a concession that the initial suspension was unjustified—and hence presumptively discriminatory or retaliatory. At a minimum, plaintiffs can be expected to make that argument. No sensible policy is furthered by punishing an employer for acknowledging that, despite a supervisor's initial judgment that a suspension or reassignment was warranted at the time, that judgment was an overreaction and the employee should be fully reinstated.

At least three other circuits—the Ninth, Eleventh, and D.C. Circuits—recognize the need to encourage adoption of effective employer decision-making and review processes and have held that "[a]n employer may cure an adverse employment action . . . before that action is the subject of litigation." *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) ("Brooks refused to accept the review and appealed, but she abandoned her job while the appeal was pending. Because the evaluation could well have been changed on appeal, it was not sufficiently final to constitute an adverse employment action."); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) ("[T]he decision to reprimand or transfer an employee, if rescinded before the employee suffers tangible harm, is not an adverse employment action. But when an employee loses pay or an employment benefit from a delayed promotion, courts have held that the employment action is not adverse only when

the action is rescinded and backpay is awarded.") (citations omitted); *cf. Brown*, 199 F.3d at 458 (low evaluation not an adverse employment action because "such evaluations could be adjusted on appeal before a separate administrative branch," and "[a]lthough Brown clearly knew of this procedure, there is no evidence that she ever sought such an adjustment.").[7]

Thus, the D.C. Circuit held in *Taylor* that there was no adverse employment action resulting from an allegedly retaliatory performance rating the employee received, even though it had the effect of lowering the amount of the employee's bonus, because the employee's supervisor "corrected the evaluation and paid the proper bonus before [the employee] brought this suit." 350 F.3d at 1289–90, 1293–94. The plaintiff could not maintain her retaliation claim, the court held, because "there was no unremedied adverse employment action when the suit was filed." *Id.* at 1294. A contrary decision, the D.C. Circuit added, would frustrate an important goal of Title VII:

> Permitting employers the opportunity to correct workplace wrongs prior to litigation is the objective of the EEO process. If a plaintiff were permitted a right to sue even if his or her employer had corrected the grievance, there would be absolutely no incentive for employers to make adjustments for past conduct during the EEO process.

Id. (quotation omitted); *see also Brooks*, 229 F.3d at 930 ("'To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.'")

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[7] The Fifth and Eighth Circuits also have held that interim decisions are not "ultimate [employment] decision[s]" and therefore do not constitute adverse employment actions. *See, e.g., Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998); *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 880–81 (8th Cir. 2005).

(quoting *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 546 (6th Cir. 1999)).

The Sixth Circuit declined to follow these well-reasoned decisions. Yet, it is clear that the employee's suspension was not the final decision of the employer. Instead, it merely began an internal process—mutually adopted by the parties in this case—that ultimately required the employer to render a final decision about the employee. That decision was to vacate the employee's suspension and award backpay for time away from work. In the end, the employer's internal decision-making process was reasonable and worked exactly as Congress—and the parties—hoped, and Respondent suffered no adverse employment action at all.

The Sixth Circuit disagreed, relying on *International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976), which held that the pendency of an internal grievance process did not toll the statute of limitations on a Title VII claim. *See* Pet. App. at 23a (citing). Its reliance was misplaced. First, this Court did not hold in *Robbins* that internal grievance procedures are irrelevant as a matter of law to determining when an adverse employment action occurs. (Indeed, because that case involved a termination, this Court had no occasion to decide how the pendency of an internal investigation affects preliminary decisions that fall short of termination.) Instead, this Court noted that the relevant statutory "occurrence" depends on the circumstances, including the parties' expectations and any contractual agreements that fix the occurrence of the triggering event. *See Robbins*, 429 U.S. at 234–35; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002) (characterizing *Robbins* as concluding that the discriminatory conduct occurred on "the date that the parties understood the termination to be final"). In that case, because there was "no indication that either party viewed the . . . discharge as anything other than 'final,'" this Court found no reason to adopt a later event as the relevant occurrence. *Robbins*, 429 U.S. at 235.

Moreover, this Court in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), specifically took into account a university's process for reviewing and officially approving preliminary tenure recommendations in determining when the statute of limitations began to run. This Court affirmed the district court's determination that the limitations period began to run after the college's governing body "formally had voted to deny [the employee] tenure" and the employee was "officially notified" of the decision—more than one year after the college's tenure committee made the initial recommendation to deny tenure. *Ricks*, 449 U.S. at 261–62. "[I]n light of [an] unbroken array of negative decisions," this Court explained, "the District Court was justified in concluding that the College had established its *official position*—and made that position apparent to Ricks—no later than [that date]." *Id.* at 262 (emphasis added).[8]

Under the Sixth Circuit's rationale, however, the limitations period in *Ricks* would have started running much earlier, for even a preliminary recommendation against tenure would have constituted an adverse employment action. *See* Pet. App. at 21a n.7.[9] Yet it is clear in this case that the parties contemplated that the employer

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[8] This Court in *Ellerth* also made clear the critical part an employer's internal decision-making process plays in determining whether challenged conduct amounts to actionable discrimination attributable to the employer as a matter of law, explaining that a "tangible employment action" entails a decision that is sufficiently final that it can fairly be said to have been "an official act of the enterprise, a company act." 524 U.S. at 762; *see also Suders*, 542 U.S. at 134 (explaining *Ellerth*'s holding that employers are strictly liable for "employer-sanctioned adverse action officially changing [an employee's] employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions").

[9] The Sixth Circuit's assertion that the "ultimate employment decision" test contravenes Title VII's goals of "'mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination,'" Pet. App. at 22a–23a (citation omitted), simply assumes the question to be decided—whether an interim decision subsequently vacated constitutes "unlawful employment discrimination."

would not render a final, official decision on disciplinary actions until it completed an investigation. The collective bargaining agreement governing the parties' employment relationship expressly provides for an investigation of disciplinary actions, conducted at the employee's request, and requires that a "decision be rendered by the Carrier within 10 days after completion of the investigation." Rule 91(b)(5), BNSF CBA, JA 57.[10] It was the employee's reinstatement with backpay that constituted the final "decision . . . rendered by the Carrier," which was obviously not adverse to Respondent.

Second, the circumstances surrounding suspensions are fundamentally different from those associated with terminations. *Cf. Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (recognizing the qualitative differences between terminations and suspensions without pay for purposes of a due process analysis and observing, "Unlike the employee . . . who faced *termination*, respondent faced only a *temporary suspension* without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all.") (emphases added). Administrative suspensions, unlike terminations, are by their nature temporary and merely allow employers to conduct investigations without further exposure to the alleged misconduct. Title VII should not be read to prevent employers from doing so, and this Court should reverse the Sixth Circuit's decision.

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[10] It is important to note that the agreement sets forth different procedures for general grievances and obtaining the employer's "decision" on disciplinary actions after an investigation (or after the time for investigation has expired). Only after the carrier renders a decision at the conclusion of an investigation may a "dissatisfied" employee "appeal" the employer's "decision" through the grievance process set forth in the agreement. Rule 91(b)(7), BNSF CBA, JA 57.

II. THE SIXTH CIRCUIT'S HOLDINGS DISCOURAGE ADOPTION OF EMPLOYMENT PRACTICES MOST CONSISTENT WITH THE SAFE AND EFFICIENT OPERATION OF THE NATION'S RAILROADS

The United States railroad industry consists of more than 650 railroads that operate over one million pieces of equipment.[11] Every day in the United States, passenger and freight trains travel more than 1.5 million miles over a network of over 233,000 miles of track.[12] While the federal government, through the Federal Railroad Administration ("FRA"), has the regulatory authority to ensure railroad safety, carriers are primarily responsible for maintaining the safe operation of the Nation's railroads on a day-to-day basis, particularly with respect to track maintenance and employee discipline. Thus, for example, federal regulations, among other things, require operators to (i) designate qualified persons to conduct track inspections;[13] (ii) adhere to a schedule in conducting track inspections;[14] (iii) appoint qualified inspectors to conduct safety inspections of freight cars;[15] (iv) prevent employees under the influence of alcohol or drugs from working on the rails;[16] and 5) remediate any

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[11] *Railroad Safety: Hearing Before the Subcomm. On Surface Transp. And Merchant Marine of the S. Comm. On Commerce, Science, and Transp.*, 107th Cong. 18 (2002) (hereinafter *Transportation Hearings*) (statement of Allan Rutter, Administrator, Federal Railroad Administration).

[12] Norman Y. Mineta, Secretary of Transportation, Remarks at the Rail Safety Action Plan Announcement in Columbia, South Carolina (May 16, 2005) (hereinafter *Mineta Remarks*) (transcript available at http://www.fra.dot.gov/us/content/1558).

[13] 49 C.F.R. § 213.7 (2005).

[14] *Id.* § 213.233.

[15] *Id.* §§ 215.11(a), 215.9.

[16] *Id.* § 219.105(a).

track out of compliance with federal safety standards.[17] As the then-Administrator of the FRA testified before a Senate subcommittee, "[t]he railroads . . . have the responsibility for compliance with the standards FRA sets and to perform the necessary inspections and tests to ensure that they do comply."[18]

The responsibilities of carriers in ensuring safety go beyond codified federal regulatory requirements. The FRA has recognized that "the Code of Federal Regulations is not the sole source of wisdom on safe practices; there are, in fact, safety problems not covered by existing rules that require a solution nonetheless."[19] In this regard, railroad operators pay particular attention to employee conduct, in light of the sobering reality that human error accounted for 38% of all accidents in the last five years and is the single largest cause of train accidents.[20] Railroad operators accordingly must adopt comprehensive policies and procedures in an effort to ensure that employees conduct themselves in a manner consistent with the safe operation of the railroads. These range from basic prohibitions (such as the prohibition on working while under the influence) to specialized instructions (such as the proper method of operating track signals). *See, e.g.*, BNSF Maintenance of Way Operating Rules §§ 1.5, 5.2 (eff. Oct. 31, 2004), *available at* http://www.bnsf.com/employees/safety/pdf/MW Safety2004.pdf.

In light of the decentralization and wide dispersion of their operations, railroads of necessity rely on their line supervisors to enforce these and the myriad other safety and operational rules applicable to the tens of thousands of rail employees in the first instance. *Cf. id.* § 1.13

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[17] *Id.* § 213.5(a).

[18] *Transportation Hearings*, *supra* note 11, at 18 (statement of Allan Rutter).

[19] *Id.*

[20] *Mineta Remarks*, *supra* note 12.

("Employees will report to and comply with instructions from supervisors who have the proper jurisdiction."). Supervisory personnel also must be charged with making judgment calls to address issues that are *not* covered by any statute or regulation, but may nevertheless be just as important to maintaining safety. Safety requires all rail employees, especially line supervisors, to act quickly and decisively to respond not only to clear emergencies, but also to situations that call for an exercise of judgment that, if handled incorrectly, may present a serious threat to the safety of the public and rail workers alike. A supervisor may, for example, be called to respond to circumstantial evidence of employee drug or alcohol abuse, and his or her decision may be based on nothing more than an assessment of an employee's appearance or demeanor. Or a supervisor may be required to draw a line between a difference in opinion and outright insubordination. In situations in which the slightest error in judgment may inadvertently lead to a deadly accident, a supervisor must retain the proper incentives to err on the side of safety.

Yet the rulings below seriously distort those incentives by exposing employers to compensatory as well as punitive damages for temporary safety measures even when subsequently corrected through the employer's internal processes. The risk is particularly acute in the context of retaliation claims. The standards the Sixth Circuit adopted would inevitably make employers reluctant to entrust discretion to supervisors, and will make supervisors reticent to exercise whatever authority they retain, especially with respect to an employee who is known to have engaged in activity arguably protected by Title VII. An employer reasonably may withhold from the supervisor the necessary authority temporarily to reassign or suspend *any* employee, when any perceived slight, or temporary decision, may result in Title VII liability—or at least involvement in costly and time-consuming litigation.

Both of the Sixth Circuit's holdings in this case accordingly undermine an employer's ability to vest

meaningful, immediate supervisory authority in its front-line supervisors, and hamper the ability of supervisors to respond to circumstances requiring immediate and decisive action. Yet in these circumstances only a swift reassignment or temporary suspension may avert a real threat to safety.[21] And even if a supervisor unfailingly errs on the side of safety, the result is that *every* exercise of supervisory judgment involving employees known to have engaged in protected activity will bring with it the possibility of a retaliation charge. That is a fundamentally unfair risk to place on employers that depend on supervisory personnel to make innumerable critical decisions every day.

It is no answer to suggest (as did the Sixth Circuit) that employers can simply suspend employees with pay to avoid Title VII liability. As a threshold matter, it is far from clear that such action would not be found to constitute an adverse employment action under the Sixth Circuit's rationale. In any event, this approach imposes an unfair and substantial economic burden on employers, who would have to continue paying every suspended employee (as well as the other employees filling in for them) but would not have the

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[21] The Sixth Circuit's holdings also jeopardize the ability of employers in other industries to entrust their front-line supervisors to make personnel decisions that have a direct effect on safety. Other common carriers—airlines, trucking companies, bus lines, and cruise ships—are all subject to extensive federal safety regulations, but are responsible for ensuring compliance with those standards. *See* 14 C.F.R. § 91.7(b) (2005) (stating that the pilot in command of an aircraft is responsible for determining whether an aircraft is airworthy); 49 C.F.R. § 396.3(a) (2005) (requiring motor carriers to "inspect, repair, and maintain" all vehicles subject to its control); *Id.* § 374.313(c) (requiring bus carriers to keep required items in working order); 33 C.F.R. § 95.050 (2005) (requiring marine employers to prevent intoxicated employees from assuming their duties). These employers in turn must rely on their supervisory personnel to ensure safe operations in the first instance. They must be able to entrust their supervisory employees with sufficient discretion to take action whenever necessary to ensure the safety of their employees and the public, and the Sixth Circuit's decision equally hampers their ability to do so.

practical ability to recover the money where, as in most cases, the suspension is upheld and the employee is eventually terminated.[22]

The Sixth Circuit's holding that decisions that are alleged to be retaliatory cannot subsequently be "cured" through the operation of the employer's internal processes also effectively requires prior management review of every personnel decision made by front line supervisors. But prior review of these decisions is simply not realistic or practical in the railroad context. With respect to the reassignment of individual employees to different tasks within their understood job responsibilities, the tasks of rail employees engaged in operations and maintenance are of necessity not static; the location, difficulty, physical demands, required technical skill, and other aspects of the individual tasks they may be expected to perform vary, depending on operational needs and the workforce management decisions of supervisors, on a day-to-day basis. Maintenance-of-way crews, for instance, may operate rail test cars, perform necessary defective rail changes, correct track geometry defects, or make emergency repairs caused by derailments or adverse weather conditions on any given day. *See Practical Guide To Railway Engineering* 36 (Am. Ry. Eng'g & Maint. Of Way Ass'n ed., 2d ed. 2003). Each of these jobs in turn may require individual members of the crew to perform a wide variety of different tasks, and railroads hire these employees to do just that.

The Sixth Circuit's overly rigid view of what constitutes a "reassignment," and the court's undue deference to the subjective desires of an employee to perform some, but not

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[22] *Cf. Homar*, 520 U.S. at 932 (rejecting due process challenge of state employee who was suspended without pay following his arrest on felony drug charges and noting, "We think . . . that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him.").

all, of the tasks associated with her job, intrude upon the fundamental prerogative of supervisors to assign (and reassign) employees to meet operational needs. Under the Sixth Circuit's view, employees simply could file discrimination charges and be able to decline to perform duties that they subjectively dislike but that would otherwise be part of the universe of tasks the employer hired them to carry out. The Sixth Circuit's decision thus creates an incentive for employees to file discrimination charges in an effort to entrench themselves in choice positions or "cherry pick" the tasks they like best, and hinders the ability of employers to manage their workforce efficiently. Title VII was never intended to straightjacket employers, and this Court has admonished that no employee should be able to place himself "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977). The Sixth Circuit's decision constitutes an unwarranted extension of Title VII and an impermissible intrusion into the employment relationship that, in the rail context, could reduce public safety.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Association of American Railroads respectfully requests this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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No. 05-259

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IN THE

Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and thus supports the position of Petitioner Burlington Northern & Santa Fe Railway Company before this Court.[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 320 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

EEAC's and the Chamber's members are all employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and other laws against employment discrimination and retaliation. As business enterprises in a competitive economy, these companies seek to maintain productivity, efficiency and discipline in their workplace operations. EEAC's and the Chamber's members, therefore, have a significant interest in the issue raised in this case, which puts in question whether an employer can be found to have retaliated against an employee in violation of Title VII simply by changing the employee's assigned job tasks in a way that does not result in any change

of job classification, pay or status, or by temporarily suspending the employee from service pending an internal investigation, after which the employee is restored to active service with no loss of pay or other adverse consequence.

The court below answered this question in the affirmative, essentially dispensing with the requirement that a Title VII retaliation plaintiff show a materially adverse employment action by the employer. In the lower court's broad view, unlawful retaliation can take the form of virtually "*any kind* of adverse action." Pet. App. at 22a. (citation omitted).

This issue is extremely important to the nationwide employer constituency that EEAC and the Chamber represent, and we have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of our experience in these matters, EEAC and the Chamber are well situated to brief the Court on the concerns of the business community and the significance of this case to employers. EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

When Burlington Northern & Santa Fe Railway Co. (BNSF) hired Sheila White in June of 1997 as a track laborer, she initially was given the responsibility of operating a forklift, along with other track laborer duties. Pet. App. at 3a. In September of that same year, White complained to management that her foreman treated her differently from male employees and had made two inappropriate remarks. Pet. App. at 4a. The company conducted an immediate investigation and then suspended the foreman without pay for

ten days and ordered him to attend sexual harassment training. *Id.*

During the investigation, BNSF heard complaints from other more senior employees that White was receiving preferential treatment. *Id.* More specifically, complaints centered on the fact that White was allowed to spend the majority of her workday operating the forklift, while track laborers with greater seniority were required to work exclusively on tracks. *Id.* In response to these complaints, BNSF gave the task of operating the forklift back to a more senior track laborer who had performed the function before White was hired. *Id.*

Approximately six months later, White apparently refused a direction from another foreman, and he temporarily suspended her for alleged insubordination, pending an investigation. *Id.* at 6a. After senior management concluded that the foreman had overreacted, BNSF lifted the suspension with full back pay and benefits. *Id.* at 7a.

White sued BNSF for sexual harassment and retaliation under Title VII. *Id.* The jury found in favor of BNSF on the sexual harassment claim, but found in White's favor on her retaliation claims. *Id.* BNSF moved for judgment as a matter of law or, in the alternative, for a new trial, contending that White had failed to establish retaliation under Title VII. *Id.* The district court denied the motion, and BNSF appealed that ruling to the Sixth Circuit. *Id.*

A panel of the Sixth Circuit reversed, finding that a minor adjustment in work assignments and a temporary suspension with full back pay and benefits did not constitute "adverse employment action[s]" and, therefore, were not actionable under Title VII. Pet. App. at 97a. White asked the full court to rehear her claim, and the court agreed to do so. *Id.* at 123a. The decision of the *en banc* court initially stated that the proper standard for determining what is an actionable adverse

employment action in the context of retaliation is whether the employer's action resulted in a "materially adverse change in the terms and conditions of [the person's] employment." *Id.* at 10a. (citation and footnote omitted). The court went on to conclude, however, that discriminatory retaliation can be "*any kind* of adverse action." *Id.* at 22a. (citation omitted). Applying this standard, the court then ruled that a temporary suspension, even one that is lifted with full back pay and benefits, as was the case here, constitutes a materially adverse change in employment. *Id.* at 22a-23a. The court also concluded that a simple change in an employee's job duties constitutes a materially adverse change in employment, even if the new duties are within the scope of his or her job classification and do not result in a loss of pay, benefits or status. *Id.* at 25a.

BNSF petitioned this Court for a writ of certiorari, which was granted on December 5, 2005.

SUMMARY OF ARGUMENT

At issue in this case is whether a claim of retaliation is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, if the plaintiff did not experience a materially adverse change in his or her terms or conditions of employment as a result. The Sixth Circuit below, while paying lip service to the "materially adverse" standard, nevertheless ruled that the word "discriminate," as it appears in Title VII's anti-retaliation provision, means "*any kind* of adverse action." Pet. App. at 22a. (citation omitted).

A standard that makes actionable *any* adverse action infringes substantially on an employer's ability to run its business. Title VII was not intended to "'diminish traditional management prerogatives.'" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). Few actions are more central to traditional management prerogatives than

assigning specific job tasks to be performed by employees and maintaining order and discipline in the workplace. Yet the decision of the Sixth Circuit below severely diminishes management's prerogatives in both of these critical areas.

Absent a "materially adverse" threshold, once an employee has complained of discrimination, virtually every subsequent change in that employee's assigned job duties becomes a potential basis for a retaliation claim under Title VII, even if all tasks assigned to the employee are within his or her existing job description and the employee suffers no reduction in pay or loss of status. By literally making a potential "federal case" of virtually every routine change in work assignments, such an interpretation of Title VII effectively would empower employees to pick and choose which of their assigned job functions they will perform, backing up their rejection of other assignments with threats of costly, time-consuming retaliation suits.

The decision below also would pose a dilemma for employers attempting to maintain workplace discipline. Employers are obligated to try to prevent sexual harassment, violence, illegal drug use and other serious workplace offenses. They also have a business responsibility to maintain order in the workplace. Customarily, the first step most employers take when an employee is suspected or accused of serious job misconduct, including insubordination, is to place the employee on temporary suspension or administrative leave pending an inquiry. If the inquiry confirms the employee's offense, the employer takes appropriate disciplinary action; otherwise, the employer lifts the suspension, usually without penalty or loss of pay. Without a materiality standard, employers would risk liability for retaliation any time they took this traditional approach in dealing with allegations of misconduct by an employee who previously had complained of discrimination. Thus, employers would be forced to make a Hobson's choice between allowing po-

tentially dangerous or disruptive individuals to remain in the workplace or temporarily suspending them pending investigation and thereby risking liability for retaliation.

Title VII's antiretaliation section should not be interpreted so as to impinge so severely on management's traditional prerogatives to assign work and administer discipline.

ARGUMENT

SOUND STATUTORY INTERPRETATION AND PUBLIC POLICY SUPPORT THE WIDELY-ACCEPTED VIEW THAT TITLE VII'S ANTI-RETALIATION SECTION APPLIES ONLY TO MATERIALLY ADVERSE EMPLOYMENT ACTIONS

A. A Materially Adverse Employment Action Is An Essential Element Of Unlawful Retaliation Under Title VII

Section 704(a) of the 1964 Civil Rights Act, commonly known as Title VII's "antiretaliation" section, makes it unlawful for an employer to discriminate against an employee because the employee has opposed a practice prohibited by Title VII or filed a charge with the Equal Employment Opportunity Commission (EEOC), given testimony, or otherwise participated in a proceeding under that statute. 42 U.S.C. § 2000e-3(a). To establish unlawful retaliation under Section 704(a), as the court below stated, a plaintiff must show: (1) that she engaged in an activity protected by Title VII; (2) that the employer took an employment action adverse to the plaintiff; and (3) that there was a causal connection between the protected activity and the adverse employment action. Pet. App. at 11a.

The dispute in this case centers on the second element in this formulation—*i.e.*, the requirement that a plaintiff show an "adverse" employment action by the employer. Although the federal courts of appeals are divided over the appropriate

standard for determining when an employer has unlawfully retaliated against an employee for the purposes of Title VII, the majority of courts have taken the sensible position that a person claiming retaliation must show some action that resulted in a "materially adverse change" in the terms and conditions of the person's employment. Pet. at 10-17. They further recognize that "materially adverse change" should parallel the requirement of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that a plaintiff show a "tangible employment action." The two courts that are the most consistent with *Ellerth* and *Faragher* have said that only adverse treatment with regard to some "ultimate employment decision"—such as hiring, granting leave, discharging, promoting, and compensating—can support a retaliation claim. *Brazoria County, Tex. v. EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). Under this view, intermediate and temporary actions such as warnings, negative performance appraisals, and lateral reassignments generally cannot be used as the basis for retaliation claims.

Although the court below purported to apply the "materially adverse" standard, in reality it did not. Initially the court said that it rejected the view that *any* adverse treatment based on a retaliatory motive is unlawful. Later in the opinion, however, the court did a complete about-face, ruling that in the context of Title VII's retaliation provision, "the words 'discriminate against' literally mean '*any kind* of adverse action.'" Pet. App. at 22a. (citation omitted). Then, demonstrating just how broad it intended the standard to be, the court concluded that an employer commits unlawful retaliation by simply asking an employee to perform the job for which she was hired and by placing her on a temporary suspension pending an investigation into possible misconduct, even though the suspension was later lifted and the

employee fully compensated for time she was not at work. The Sixth Circuit has so diluted the "materially adverse" standard as to allow anything to satisfy it, thereby warranting reversal of the decision below.

B. The Requirement That A Retaliation Claimant Be Able To Show A Materially Adverse Employment Action Is Fully Consistent With Supreme Court Decisions Interpreting Title VII

This Court went to significant lengths in its *Ellerth* and *Faragher* decisions to make clear that its concept of "tangible employment actions" is limited to actions that have material, adverse effects on employees' terms or conditions of employment. In the Court's words:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment *with significantly different responsibilities*, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761 (emphasis added). Indeed, the Court explicitly stated that "[a] tangible employment action in most cases inflicts direct economic harm." *Id.* at 762. To conclude that the Court intended this term to include inconsequential changes in job assignments of the sort involved in this case, as the court below has done, is a distortion of the Court's decisions.

Similarly, while the Court also recognized in *Ellerth* and *Faragher* that actions other than "tangible employment actions" can constitute unlawful discrimination under the "hostile environment" theory, it made clear in those decisions, as it has in the past, that to rise to the level of actionable discrimination under Title VII, the actions in question must be so "severe or pervasive" as to have "altered terms or conditions of employment." *Ellerth*, 524 U.S. at 752 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)).

Again, these references reflect the Court's recognition that Title VII does not address petty or routine workplace irritations or disappointments, but only actions sufficiently serious to adversely affect an employee's employment in a material way.

C. Unless A Materially Adverse Employment Action Is Required To Establish Unlawful Retaliation Under Title VII, Virtually Every Employer Action And Reaction Following A Complaint Alleging Discrimination Will Require Litigation

The rule that a plaintiff must show a materially adverse employment action to establish unlawful retaliation under Title VII distinguishes actual discrimination from mere unpleasantness and disappointment of the sort employees often experience in relations with their supervisors and managers. "'Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.'" *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)).

Every employee has the right to file charges with the EEOC and to oppose conduct he or she reasonably believes is unlawful under Title VII.[2] And every employee who has exercised these rights has the potential to become a retaliation plaintiff. EEOC statistics show that retaliation charges are now the fastest-growing category of charges filed under Title

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[2] Several courts have ruled that an employee's opposition to a practice the employee reasonably regards as a Title VII violation is protected under Section 704(a), even if the employee's belief is mistaken. *E.g.*, *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

VII, having roughly doubled over the past decade.[3] If the courts do not keep the standard for establishing retaliatory conduct at a level that materially affects the employment relationship, these numbers can be expected to increase even more dramatically, with resulting effects on caseloads not only of the EEOC, but also of the federal courts themselves.

Section 704(a) is designed to assure that employees who exercise their Title VII rights do not suffer discrimination in employment as a result. It is not, however, designed to vaccinate such employees against legitimate discipline or supervisory control. "Engaging in protected activities or protected conduct should not put the plaintiff in a better position than she would be in otherwise." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (citation omitted).

Employees who have accused their employers of discrimination are likely to view every subsequent action and reaction by their employers through a prism of suspicion and distrust. Given the costs of litigation, if every reassignment of tasks within their job classification could serve as a viable basis for a retaliation suit, such employees would have an effective veto power over routine work assignments and supervisory directives they did not happen to like. Such an interpretation of Title VII would be at odds with the fundamental purpose of the statute, which was not intended to "diminish traditional management prerogatives." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). The requirement that a retaliation claimant be able

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[3] The statistics reported on EEOC's website show that Title VII charges alleging retaliation increased from 10,499 in Fiscal Year 1992 to 20,240 in Fiscal Year 2004 and, during that same period, grew from 14.5 percent to 25.5 percent of all Title VII charges filed with the agency. EEOC Charge Statistics, FY 1992 Through FY 2004, *available at* http://www.eeoc.gov/stats/charges.html.

to show a materially adverse employment action prevents this unintended result, while assuring that employees' rights are protected.

Finally, the Sixth Circuit's unmanageably broad standard threatens to seriously undermine important relationships between employers and workers by fostering a work environment that is hyper-focused on confrontational legal action. Unlike typical tort and contract claims, employment controversies do not take place between strangers. Most labor and employment disputes involve individuals and companies with an ongoing relationship that began before the disagreement arose and in many cases is expected to continue after the parties' differences are resolved. Employers have a strong interest in preserving positive relationships with employees. Employers invest substantial funds, as well as the time and effort of a variety of personnel, in training each employee to do the best possible job. Simultaneously, employees invest their time, their effort, and considerable emotional capital in learning their craft and developing their careers. All of this can be destroyed irretrievably by the acrimony of drawn-out litigation.

It is largely for this reason—as well as the staggering legal fees often associated with employment litigation[4]—that many large companies have instituted in-house alternative dispute resolution programs aimed at resolving workplace conflicts

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[4] Even a victory in court can cost an employer hundreds of thousands of dollars. One survey showed that the average cost to an employer of litigating a seriously contested employment discrimination case is $130,000. Jacqueline R. DeSouza, *Alternative Dispute Resolution: Methods to Address Workplace Conflicts in Health Services Organizations*, Journal of Healthcare Mgmt. (Sept. 1, 1998), *available in* LEXIS, NEWS Library, ASAPII File, at *2. In addition to legal fees, employers embroiled in employment discrimination litigation also incur additional costs stemming from the time commitment of employees involved in the case as witnesses and the loss of substantial investment in the plaintiff as an employee.

quickly, more amicably and in ways that seek preserve these hard-won relationships. Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press 1997) at 113. Indeed, even Title VII itself encourages conciliation and resolution rather than litigation. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal").

By allowing employees to litigate virtually *any* inconsequential decision reached by an employer, even a temporary act intended to help the employer to make a better final employment decision, the EEOC and the court below discourage employers and employees from working through routine workplace disputes together, informally. The result inevitably will be that many of these disputes will end up like this one, with the parties at odds for many years at tremendous emotional and financial cost to both. Title VII's anti-retaliation section should not be interpreted so as to undermine relationships between employers and workers. Instead, that section is aimed at retaliatory actions that have material affects on terms or conditions of employment.

D. Neither A Reassignment To Different Tasks Within The Same Job Classification Nor A Temporary Suspension Pending An Internal Investigation Amounts To Discrimination Under Title VII

In this case, White claims that BNSF discriminated against her by relieving her of responsibility for operating a forklift so that she could perform other track maintenance work. Yet it is undisputed that both track maintenance and forklift work fell within the designated duties of her job classification

("track laborer"), that track maintenance responsibilities had always been part of White's job, and that the reassignment resulted in no change in her classification, rate of pay or benefits. Pet. App. at 95a. It is also undisputed that this minor change in daily work assignments did not result in White being treated differently or more harshly than other track laborers; all but one of White's colleagues performed track maintenance work full time with no opportunity to operate the forklift. Pet. App. At 88a-89a.

Assignment of tasks and responsibilities to individual employees has long been recognized in labor law as a fundamental prerogative of management. *See generally* ABA Section of Lab. & Empl. Law, *Elkouri & Elkouri: How Arbitration Works* 697-705 (Alan Miles Ruben, ed., BNA 6th ed. 2003), and authorities therein cited. Reassigning an employee to different duties within his or her existing job classification, without significantly changing pay or benefits, is not regarded as a sufficiently "material, substantial, and significant change" in terms or conditions of employment to require collective bargaining under the National Labor Relations Act. *E.g., Alamo Cement Co.*, 277 N.L.R.B. 1031 (1985) (footnote omitted); *see generally* 1 ABA Section of Lab. & Empl. Law, *The Developing Labor Law* 1220-23 (BNA 4th ed. 2000 & Supp. 2004). Thus, an employer's mere, routine exercise of the authority to assign or reassign job tasks to employees does not, without more, amount to a change in their employment status, compensation, terms, conditions, or privileges of employment, and therefore cannot constitute actionable discrimination under Title VII.

White also claims that BNSF discriminated against her by suspending her pending an internal inquiry into a supervisor's determination that she had been insubordinate. Yet it is undisputed that the suspension was only temporary, that the suspension was lifted upon completion of the inquiry, and that she ultimately suffered no loss of pay or benefits or other

employment-related detriment. Thus, again, no material adverse action had occurred.

Employers regularly conduct internal workplace investigations. Indeed, they are under ever-increasing legal pressure to do so. Under this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), an employer who fails to investigate a complaint of sexual harassment promptly and take appropriate steps to correct such harassment cannot use the affirmative defense to liability for sexual harassment by a supervisor that those cases established. Subsequent court decisions have extended this approach to allegations of racial harassment and other discriminatory practices, as well. *See, e.g., Hill v. American Gen. Fin., Inc.*, 218 F.3d 639 (7th Cir. 2000) (racial harassment); *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000) (racial harassment and retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998) (same). Employers also are obligated to conduct workplace investigations under the Occupational Safety and Health Act, 29 U.S.C. §.654(a)(1), the Drug-Free Workplace Act, 41 U.S.C. §§ 701-07, the Securities and Exchange Act, 15 U.S.C. §§ 78o(b)(4)(E) and 78o(f), and numerous other laws.

Many if not all employers also voluntarily adopt rules that establish minimum standards for employee conduct in the workplace. Safety concerns provide one important reason for having such rules. A worker who is fighting, threatening violence or merely engaging in horseplay that distracts other workers, or working carelessly or without protective equipment, can cause an accident, injuring himself, co-workers, and perhaps the public. In fact, where the work itself involves exposure to potentially dangerous machinery, toxic chemicals, or other hazardous materials, compliance with conduct rules becomes even more important. Other work rules are grounded in business concerns such as rules forbidding theft.

Where allegations of serious employee misconduct are at issue, a customary first step in conducting such internal investigations is to place the accused employee on temporary suspension or administrative leave pending the outcome of the inquiry. This gives the employer time to ascertain the facts and decide on an appropriate response, without risking the disruption or additional misconduct that could occur if the accused were allowed to remain in the workplace in the interim. In many instances, this preliminary step is necessary to prevent interference with the investigation itself. In some cases, too, it is necessary to remove an accused wrongdoer from the premises after the employer has been placed on notice of his or her alleged misconduct because failure to do so could expose the employer to liability for negligence, or worse, if the same individual were to commit subsequent actions that caused injury to coworkers, customers or others. The temporary suspension procedure thus protects important interests of the employer and others during the pendency of the investigation.

At the same time, the temporary suspension procedure does not adversely affect the employee because if the inquiry results in a determination that the allegations of misconduct were unfounded—or, as in this case, that a supervisor "overreacted"—the employer can lift the suspension and restore the employee's pay for the interim period, as BNSF did here. Thus, the suspension is merely temporary, and ultimately results in no adverse employment action at all, material or otherwise.

The court below specifically acknowledged the concern that employers maintain the prerogative to temporarily suspend employees who are suspected of wrongdoing pending an investigation, lest they be placed in the untenable position having to choose between keeping suspected wrongdoers in their workplace or facing potential Title VII liability. The court dismissed this concern, however, sug-

gesting employers may avoid liability simply by continuing to pay employees while they are on temporary suspension.

Unfortunately, leave with pay is not a workable solution. Where the employer discovers during the course of an investigation that a suspended employee has engaged in serious misconduct, many state wage payment laws would make it difficult—even impossible—for the employer to recover paychecks awarded the employee during the temporary suspension. *See, e.g.*, Cal. Lab. Code § 450; Md. Code Ann., Lab. & Empl. § 3-503. Accordingly, an employee found to have engaged in serious misconduct would be *rewarded* with paid time off before his well-deserved termination. Such a practice sends the wrong message both to the wrongdoer and other employees, as well as undermines the credibility of the employer's disciplinary process. It also leaves the door open for unscrupulous employees to abuse the system in order to secure additional paid time-off for themselves, further eroding the employer's efforts to prevent future misconduct.

Moreover, a policy of paying employees while they are on a temporary suspension is costly. Even an *unpaid* temporary suspension imposes significant financial and operational costs on an employer. If also required to pay wrongdoers for work not performed, employers might simply abandon the practice altogether, even when the suspected misconduct is serious. The likely result will be greater exposure to liability for employers for negligence and an overall increase in employment litigation. Ultimately, interpreting Title VII so as to cause employers to abandon this common and very sound business practice will disadvantage both employers and workers.

On the other hand, the employer's ability to maintain a safe, effective and orderly work environment is in no way compromised by a disciplinary process that temporarily suspends an employee without pay until such time as an internal investigation clears her of wrongdoing. Moreover,

having been fully compensated during the period of the temporary suspension, the employee receives what amounts to paid time off.

E. The EEOC's "Reasonably Likely To Deter" Standard For Cases Involving Alleged Retaliation Is Unmanageably Broad And Should Be Rejected

White repeatedly has argued for the adoption of an expansive definition of retaliation recently advocated by the Equal Employment Opportunity Commission (EEOC), which would hold an employer liable for "*any* adverse treatment" that is "reasonably likely to deter" someone from engaging in protected activity. EEOC Compl. Man. § 8 (1998) ("Retaliation") (emphasis added). Although the court below considered (and said it had rejected) the EEOC's interpretation of the law, it nevertheless went on to apply a standard that closely resembles the one espoused by that agency.

We respectfully ask the Court to reject the EEOC's flawed reading of the law. Informal guidance documents, such as the Compliance Manual section containing the EEOC's views on retaliation, are not entitled to deference under *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984), but merely to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and then only to the extent that they have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). In determining what level of respect is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (citations and internal quotations omitted).

Applying the *Skidmore* factors to the EEOC's interpretation, the agency's view lacks any persuasive authority and therefore is not entitled to respect from this Court. As an initial matter, we note that the EEOC's "reasonably likely to deter" standard is new and represents a significant departure from its earlier policy pronouncements. The agency announced this broad standard for retaliation cases for the first time in 1998 when it published revisions to its Compliance Manual—the official "guidebook" for EEOC investigators on analyzing, investigating and resolving employment discrimination charges. EEOC Compl. Man. § 8 (1998) ("Retaliation" ¶ 8008). Before 1998, when the events that gave rise to this case first transpired, the agency approached retaliation cases the same way it did all other types of discrimination cases. Back then, the Compliance Manual instructed investigators that a *prima facie* case of retaliation can be shown in "more or less the same manner as a charge or complaint filed on any other basis under Title VII or the ADEA." EEOC Compl. Man. § 614 (1988) ("Retaliation").[5] The only "one difference" between a retaliation case and those involving other types of discrimination, the agency said at the time, is that retaliation cases are sometimes "more difficult" to prove.

The EEOC does not attempt to account for its sudden departure from its earlier (and we think more accurate) reading of Title VII, and its new standard is both wrong and unworkable for employers. Allowing employees to sue employers for insignificant acts that have no material, adverse effect on terms or conditions of employment seriously undermines the ability of employers to manage and maintain relationships with workers and will lead to increased charge filing and litigation. Moreover, the new EEOC standard is a *subjective* one, with employer liability hinging in large part

[5] A copy of the superseded EEOC Compliance Manual Chapter on "Retaliation" is available at the National Archives.

on the employee's personal reaction to even a slight disagreement or affront. Although the agency says it would exclude "petty slights and trivial annoyances" from the definition of actionable retaliation because such acts are not "reasonably likely to deter" a person from engaging in protected activity, the examples of actionable retaliation offered in the manual illustrate just how difficult it is to discern actionable from non-actionable retaliation when the conduct involved is not from an objective standpoint materially adverse.

The EEOC says in one example, for instance, that actions such as excluding an employee from invitations to lunch regularly extended to other employees would constitute unlawful retaliation. It does not suggest, however, that the worker's employment opportunities were in any way impacted by this exclusion. Giving employees virtually complete control over employer liability for retaliation in this way will render employers defenseless against many such claims and make it difficult—even impossible—to prevent them, a result that surely frustrates Title VII.

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit that the decision below should be reversed.

Respectfully submitted,

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No. 05-259

IN THE

Supreme Court of the United States

Burlington Northern & Santa Fe Railway Co.,

Petitioner,

v.

Sheila White,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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I. STATEMENT OF INTEREST OF AMICI CURIAE[1]

This brief *amici curiae* is filed on behalf of two leading business organizations. The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. SHRM provides education and information services, conferences and seminars, government and media representation, online services, and publications to its members. As an influential voice, SHRM's mission also is to advance the human resource profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

The National Federation of Independent Business Legal Foundation — a nonprofit public interest law firm established to protect the rights of America's small business owners — is the legal arm of the National Federation of Independent Business ("NFIB"), the nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all fifty states. The 600,000 NFIB members own a wide variety of small

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent are on file with the Clerk of Court.

businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers.

The *amici* organizations are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of non-discrimination and equal employment opportunity, and more specifically, the nature and scope of an employer's obligation to provide a workplace free from retaliation. SHRM and NFIB recognize their responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the workplace and to discourage discrimination in any form. As part of this responsibility, the *amici* emphatically oppose and urgently counsel their members against any form of discrimination, including unlawful retaliation against individuals who have exercised their rights under Title VII or the numerous other employment laws that prohibit retaliation.

In compliance with these basic principles, SHRM and NFIB offer their members written guidance and training to develop policies and procedures that will encourage employers to prevent and employees to report retaliation in the workplace. For example, in its sample employee handbook accessible to members on its website, SHRM includes a section entitled "Non-Discrimination and Anti-Harassment Policy," which sets forth procedures for reporting, investigating, and responding to alleged incidents of harassment, discrimination, or retaliation.[2] This section includes the following provision:

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[2] An excerpt from the referenced handbook is attached in the Appendix.

Retaliation is Prohibited

> XYZ prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports. Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action.[3]

NFIB provides similar guidance to its members in its Model Employee Handbook for Small Business, which includes a "Non-Harassment Policy/Non-Discrimination Policy," that sets forth similar procedures and prohibitions regarding retaliation.

With respect to this case, *amici*'s interest is to protect their members by supporting clear rules that encourage employers to initiate and maintain, and employees to use, procedures that address claims of unlawful retaliation. The standard advocated by Respondent and applied by the Sixth Circuit below is vague and uncertain, and unjustifiably increases the risk of litigation and employer liability for any interim or minor employment action. The standard adopted by the Sixth Circuit encourages employees to bypass internally established mechanisms and seek judicial redress prematurely, before the employer has had the opportunity to investigate and evaluate the propriety of a supervisor's allegedly retaliatory action. *Amici* submit this brief to further their goal of promoting management policies that foster the efficient internal resolution of employment

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[3] Appendix, at A-6.

disputes and limit the risk of liability for interim and intangible employment actions.

SHRM has participated as *amicus curiae* in many cases before this Court, including the cases establishing the principles that *amici* seek to uphold in this brief. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Pa. State Police v. Suders*, 542 U.S. 129 (2004); *Kolstad v. ADA*, 527 U.S. 526 (1999).[4]

II. SUMMARY OF ARGUMENT

Amici ask this Court to clarify that only final and formal employment actions may constitute discriminatory retaliation. Below, the Sixth Circuit determined that a job reassignment and a temporary suspension — neither resulting in any tangible loss to the plaintiff — constitute actionable forms of retaliation. *Amici* submit that this decision conflicts with Title VII policies consistently espoused by this Court when delineating the scope of actionable forms of discrimination. To effectuate these policies, which promote internal resolution of employee complaints, actionable retaliation should be limited to "tangible employment actions," which, to be "tangible," need to encompass final, official acts of the employer — in other words, "ultimate tangible employment actions," such as hiring, firing, or failing to promote.

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[4] SHRM and NFIB have participated separately or collectively in other cases before this Court; *see Arbaugh v. Y. & H. Corp.*, 125 S. Ct. 2246 (2005) (SHRM and NFIB); *Ballard v. Comm'r*, 125 S. Ct. 1270 (2005) (NFIB); *Rapanos v. United States*, 126 S. Ct. 414 (2005) (NFIB); *McNab v. United States*, 540 U.S. 1177 (2004) (NFIB); *Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202 (1997) (SHRM); *Pierce v. Underwood*, 487 U.S. 552 (1988) (SHRM); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (SHRM).

In its prior decisions, this Court created "safe harbors" from discrimination complaints for employers who promote legal compliance, *i.e.*, establish and utilize internal policies and procedures designed to prevent their supervisors from violating protected rights and to correct those situations where non-compliant supervisors do not follow company policy. Thus, when the treatment of an employee falls short of being a "tangible employment action," the employer may assert an affirmative defense if it has in place the appropriate internal resolution mechanisms and the employee has not taken advantage of these channels for avoiding litigation. *See Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (establishing affirmative defense to sexual harassment hostile environment claims); *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (extending affirmative defense to certain constructive discharge claims); *see also Kolstad v. ADA*, 527 U.S. 526 (1999) (denying punitive damages when employers make good-faith efforts to prevent discrimination in the workplace).

Amici submit that the Court's prior decisions, when read in their entirety, require the standard for actionable retaliation to incorporate the policies underlying these previously established "safe harbors" for all manifestations of discrimination. In so doing, there is a compelling need for this Court to provide the identical standard for actionable conduct to answer these closely related questions: What is discrimination? What is harassment? And, in the issue at hand, what is retaliation?

Thus, when an employer achieves legal compliance and cures an interim employment act by a supervisor that was done in contravention of the employer's anti-retaliation policy, there should be no liability. Otherwise, there is an

inherent conflict in instructing employers to establish — and employees to utilize — internal grievance procedures, while at the same time removing all incentive for these mechanisms by attaching liability for actions that employers have not had the chance to review pursuant to those procedures.

To cure this tension, *amici* urge this Court to assimilate the principles endorsed in previous decisions and hold expressly that only "ultimate tangible employment actions," imposed after the exhaustion of internal grievance procedures, are "official" acts sufficient to form the basis of a claim of actionable unlawful discrimination in any form, including retaliation. This unified standard comports with the policies expressed in prior decisions of this Court, and will provide clear guidance to employers, practitioners and the lower courts.

III. ARGUMENT

A. Only "Ultimate Tangible Employment Actions" Should Be Actionable.

This Court has recognized that employer liability for discrimination under Title VII attaches "when a discriminatory act results in a tangible employment action." *Ellerth*, 524 U.S. at 760; *see also Faragher*, 524 U.S. at 790 ("[T]here is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown."). Because of the need to have one clear standard, *amici* submit that what is actionable retaliation should be governed by the same test. Indeed, especially in the retaliation context, there

is a need to clarify that tangible employment actions do not include job transfers to equal paying positions or interim suspensions that are subsequently overturned through internal complaint procedures.

To reach this result, this Court need only explain that its prior decisions, read in their entirety and incorporating their policy pronouncements, must limit actionable retaliatory actions to "ultimate tangible employment actions," defined to include only those that are final "official" acts of the employer, implemented after exhaustion of internal resolution mechanisms. This standard will give a unified direction to employers, small businesses, and practitioners, while reinforcing the incentive to employees to fulfill their duty to mitigate and to employers to fulfill their duty to conciliate.

In *Ellerth* and *Faragher*, this Court recognized that the purposes of Title VII are served by imposing duties on the employer and the employee to make good faith efforts to resolve discrimination complaints internally. The Court determined that an employer may be strictly liable for sexual harassment by a supervisor only if there has been a "tangible employment action." In its decision, the Court "imported" from lower court decisions a non-exhaustive list of acts within and without this category:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761. The Court excluded from this

category "a bruised ego," "demotion without change in pay, benefits, duties or prestige," and "reassignment to more inconvenient job." *Id.* The Court explained further that a tangible employment action must be an "official" company act:

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

524 U.S. at 762. When there has been no tangible employment action, the employer may assert an affirmative defense if "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and the employee "unreasonably failed to take advantage of any preventive or corrective opportunities." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

This standard for employer liability was intended to accommodate Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employees . . . ." *Ellerth*, 524 U.S. at 764. Echoing these principles, the Court stated in *Faragher* that this framework was intended to "avoid [the] particular temptation to litigate," by allowing the employer to show it had sought to prevent or eliminate harassment, while the employee had failed "to prevent harm that could have been avoided":

> Although Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," [citation omitted], its "primary objective," like that of any statute meant to influence primary conduct, is *not to provide redress but to avoid harm. . . .* It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. *Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.*
>
> The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects *an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages"* that result from violations of the statute.

524 U.S. at 805-806 (emphasis added) (citations omitted).

This Court's subsequent decisions have assimilated these remedial and preventive purposes by imposing other limits on liability for discrimination, requiring an "official" company act before an employer may be liable, and providing a defense to employers who promulgate anti-discrimination policies and attempt internal resolution. *See Suders*, 542 U.S. at 134 and 150 (constructive discharge

claims must "follow the path marked by" *Ellerth* and *Faragher*, which "divided the universe of supervisor-harassment claims according to the presence or absence of an official act . . ."; affirmative defense available if there is no official act, employer had effective policy for resolving harassment complaints, and plaintiff failed to avail herself of remedial apparatus); *Kolstad*, 527 U.S. at 545 (" '[g]iving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes' Title VII's objective of 'motivat[ing] employers to detect and deter Title VII violations' ").

Amici submit that to determine what constitutes actionable retaliation, the lower courts should be instructed to incorporate these same policies and interrelated duties. Those lower courts that have imposed liability for retaliation based on actions that fall short of final, tangible employment actions, have interpreted the law too broadly.[5] By holding that Title VII's retaliation provision covers any adverse treatment or subjectively disadvantageous effect, some courts have attached liability to interim or minor actions not intended to be actionable by either Title VII or this Court.

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[5] *See, e.g., Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426 (2d Cir. 1999) (transfer resulting in different duties and contact with prisoners was adverse employment action); *Collins v. Illinois*, 830 F.2d 692 (7th Cir. 1987) (transfer to different department with no reduction in pay or benefits was adverse action because plaintiff no longer had own office, phone, or business cards); *Shannon v. BellSouth Telecomms., Inc.*, 292 F.3d 712 (11th Cir. 2002) (plaintiff suffered adverse employment action because he was "totally blackballed" from overtime opportunities, despite evidence that fewer overtime opportunities were available because of the hiring of additional employees).

For example, the Ninth Circuit, in *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000), relying on EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998), determined that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity." On the one hand, that standard is inherently incompatible with the "ultimate tangible employment action" standard *if* it fails to encourage internal complaints and allow for a potential cure of "deterrent" events. On the other, *amici* submit that the standard they propose, by requiring any suspect actions to be internally reviewable and reversible, incorporates the concerns underlying the Ninth Circuit's and the EEOC's standard. If the applicable standard requires potentially chilling conduct to be subject to complaint and upon review to become an "official act" before it can be deemed actionable, the deterrent potential is ultimately eliminated.

In the present case, the lower court considered two interim employment actions that the employee claimed were imposed in retaliation for her complaints of discrimination. She was reassigned from her job operating a forklift to a position she previously held and originally applied for, retaining the same pay and benefits. Later, she was suspended without pay, until her grievance was resolved, at which time she was reinstated with full back pay. In analyzing whether these were actionable as unlawful retaliation, the Sixth Circuit cited *Ellerth* for the principle that "not just any discriminatory act by an employer constitutes discrimination under Title VII,"[6] and relied on *Ellerth*'s illustrative list of tangible employment actions.[7]

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[6] *White v. Burlington Northern & Santa Fe Ry.*, 364 F.3d 789, 795 (6th Cir. 2004) (en banc), *cert. granted in part*, 126 S. Ct. 797 (2005).

[7] *Id.* at 798.

The Sixth Circuit also urged, as do *amici* here, that one standard should "[apply] equally to all Title VII discrimination claims, not only to retaliation claims. Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute . . . ."[8]

Despite giving recognition to these fundamental principles, the Sixth Circuit failed to reconcile its decision with *Ellerth*'s examples of actionable conduct and its "linkage of liability limitation to effective preventive and corrective measures . . . ." *Suders*, 542 U.S. at 145. Thus, rather than adopt a standard for retaliation that supported Title VII's conciliatory purposes by giving an incentive to both employers and employees to attempt resolution through internal grievance procedures, the Sixth Circuit held the employee must only "show that she suffered 'a materially adverse change in the terms of her employment.' "[9] Indeed, the Sixth Circuit found that the pendency of an internal grievance process should not preclude an employee from bringing an action under Title VII to challenge the decision under review.[10] However, by rejecting the importance of seeing the grievance process to its conclusion, the Sixth Circuit ignored this Court's teachings and established a doctrine that, if affirmed, will encourage early, unnecessary, and docket-clogging litigation.

The Sixth Circuit rejected a more stringent standard for the additional stated reason that merely reversing and reimbursing for an erroneous decision contravenes a

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[8] *Id.* at 799.

[9] *Id.* at 797, citing *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876 (6th Cir. 1996).

[10] 364 F.3d at 803.

statutory scheme that makes persons whole for injuries suffered by providing interest on back pay, attorney's fees, punitive damages, and damages for emotional suffering. In so doing, the lower court did not appreciate that garden variety payroll adjustments to correct any number of mistakes happen on a regular basis; and in these circumstances, employers never pay attorney's fees, punitive or compensatory damages, or interest. The applicable standard for actionable retaliation should not deprive employers of the opportunity to correct mistaken decisions by supervisors. A potentially unlawful interim employment action can be and should be cured after review through internal processes. Here, the interim suspension without pay was not the end result of the employer's internal processes. Rather, the ultimate act of the employer was the lifting of the suspension and restoration of full pay. Similarly, reassigning the employee to other tasks within her job classification was not a tangible employment action sufficient to create employer liability, even if the job were more inconvenient. *See Ellerth*, 524 U.S. at 761.

In these circumstances, the Sixth Circuit made no attempt to explain how a reassignment to a previously held position and a reversed suspension with no economic harm fell within the same category as "hiring, firing, failing to promote, reassignment with significantly different responsibilities . . . ." *Id.*[11] Nor did it reconcile its decision

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[11] Citing *Ellerth*, and noting that "not everything that makes an employee unhappy is an actionable adverse action," the Tenth Circuit recently held that an employee's dissatisfaction with his new position was insufficient to establish a violation of the Americans with Disabilities Act. *Couture v. Belle Bonfils Memorial Blood Center*, No. 04-1397, 151 Fed. Appx. 685 (10th Cir. Oct. 25, 2005) (unpublished) ("reassignment to [a job] which is simply undesired by the plaintiff is not" an actionable employment action). *See also Williams v. Bristol-*

with *Suders*, in which this Court "follow[ed] the path marked by" *Ellerth* and *Faragher* by giving these examples of tangible employment actions: "employer-sanctioned adverse action[s] officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." *Suders*, 542 U.S. at 134.

Indeed, the decision below runs afoul of this Court's carefully crafted policy pronouncements that underlie the affirmative defense established in *Faragher* and *Ellerth*. By creating an affirmative defense for employers who establish and maintain appropriate internal grievance mechanisms, this Court gave employers significant incentive to respond to complaints internally. The decision below, however, discourages exhaustion of internal grievance procedures and provides a disincentive to employers to attempt to discharge their duty under Title VII to prevent unlawful retaliatory behavior. Indeed, unless reversed, the Sixth Circuit will enhance the "temptation to litigate"[12] by plaintiffs' lawyers who merely seek attorney's fees or other damages in situations where the employer's reversal of supervisory conduct will be used to support an implied claim of wrongdoing. Given that economic risk, how can *amici* responsibly advise their members to have policies that are designed to correct retaliation?

Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (purely lateral transfer, with no demotion in form or substance, and no reduction in pay, is not actionable discrimination; "[o]therwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The [EEOC], already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complains would be lost among the trivial.").

[12] *Faragher*, 524 U.S. at 806.

In its non-exclusive list of what constitutes a "tangible employment action," this Court signaled that this standard should not encompass a reassignment to a position that does not have intolerable working conditions, a reversed suspension with no resulting economic harm, or a myriad of other minor or interim employment actions. The Court needs to reinforce this signal here because its illustrative list has been misapplied at best, or ignored at worst.

This Court should now complete the evolution of a uniform standard for employer liability and state explicitly what constitutes an actionable tangible employment action for all manifestations of discrimination in the workplace. To assist the lower courts, human resource professionals and small company executives, this Court should enunciate a unitary, more explicit, appropriate, and practical standard that can be applied consistently and with certainty, and that removes from judicial scrutiny any conduct that falls short of an ultimate tangible employment action.

Ellerth and *Faragher* teach that to be an actionable ultimate tangible employment action, the event complained of must satisfy the enumerated *Ellerth* factors for tangible employment actions, *i.e.*, result in significant change in employment status and also be an official, final act that has been given the imprimatur of the employer, implemented after review via its internal processes. This fundamental *Ellerth* principle rests on the "basic policy" of Title VII: to "encourage[e] forethought by employers and saving action by objecting employees . . . ." 524 U.S. at 764. To fully effectuate this policy, it would be improper to impose employer liability for interim, allegedly retaliatory employment decisions that are not *ultimate*. *See Kolstad*, 527 U.S. at 545 ("Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying

Title VII. The statute's 'primary objective' is 'a prophylactic one.' "). Internal mechanisms for resolution of retaliation complaints should be afforded the same deference as mechanisms in place to deal with harassment complaints.

To be consistent with the policies espoused in *Ellerth* and *Faragher*, the Court should take the next step and make explicit what was intended. *Amici* respectfully submit that an allegedly retaliatory act cannot constitute illegal discrimination until it is a final, official, irreversible action, implemented after exhaustion of the employer's internal resolution mechanisms.

B. Characterizing An Interim Or Minor Employment Action As An Actionable "Tangible Employment Action" Is So Expansive That Employers' Hands Will Be Tied In Day-To-Day Employment Decisions.

The Sixth Circuit's decision jeopardizes legitimate employer practices by imposing an unwarranted and unpredictable litigation risk. EEOC statistics show that the number of Title VII retaliation complaints almost doubled in the period between 1992 and 2004 — from 10,499 charges filed in fiscal year 1992, to 20,240 charges filed in fiscal year 2004.[13] These statistics demonstrate that the litigation risk is real and there is an urgent need for clarity in a workplace environment infested by increasing retaliation claims.

Recent analysis confirms that this trend stems in part from precisely the problem *amici* ask this Court to resolve:

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[13] *Charge Statistics FY 1992 Through FY 2004*, compiled by the Office of Research, Information, and Planning from the U.S. Equal Employment Opportunity Commission's Charge Data System, http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005).

the lower courts' recognition of an expanding and volatile range of retaliation claims. Martha Neil, *A Trap for Employers: Retaliation Actions Are on the Rise in Employment Discrimination Cases*, ABA Journal, August, 2005 (91—AUG A.B.A. J. 20). Indeed, given this trend, it has become more difficult for employers to predict "potential pitfalls," especially given that "[w]hat exactly constitutes retaliation varies, depending on . . . the appellate circuit in which [the law] will be applied."[14]

Contributing to this unpredictability is the nature of a retaliation claim. Discrimination complaints stem from conduct that is recognized as inherently egregious and avoidable. In contrast, retaliation claims often concern conduct arising from an emotional response that simply reflects human nature: a supervisor wrongfully accused of discrimination may, without intending impermissible retaliation, "get caught [up] in the heat of the moment."[15] The employer's internal mechanisms, implemented through a human resource professional or upper level management, who act as goalkeepers, fulfill the employer's responsibility to ensure that human nature is not permitted to eviscerate statutory rights. Missteps of human nature should be permitted to be investigated and potentially cured by internal review.

Without clear guidance from this Court, employers risk being held liable for individual conduct that Title VII was not meant to address — because it lacks the official "imprimatur of the enterprise." *Ellerth*, 524 U.S. at 762. Only final, official acts of the employer should be actionable as discriminatory retaliation. Otherwise, affirming the Sixth

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[14] *Id.* at 20-21.

[15] *Id.* at 20.

Circuit's decision not only conflicts with this Court's efforts to promote Title VII's statutory policy of conciliation, but also is detrimental to the accepted and successful structure of the American workplace.

It is part of normal operations for an employer to control the rules and regulations of its business, imposing interim disciplinary measures when appropriate. For the courts to say, in conflict with this structure, that any interim employment decision is subject to legal scrutiny, interferes with the corporation's or small business's autonomy. Congress did not intend Title VII to impinge an employer's ability to move employees from one job to another, where the pay is the same, for fear that the transferred employee will be unhappy and file a lawsuit alleging that the transfer was retaliatory.

A low threshold for liability also will discourage employers from imposing interim disciplinary measures in lieu of termination. For example, if reviewable suspension and termination are equally actionable under the law, an employer may simply terminate an employee, rather than invest time and effort in suspension or other interim measures, followed by investigation and seeing internal mechanisms through to their conclusion. Moreover, suspension with pay is not a satisfactory alternative interim measure, because it rewards individuals who may later be determined to have acted improperly.

Beyond this, without overruling the Sixth Circuit, there is no incentive for an employer to review an interim or temporary employment decision, with an eye to reversing it if it is incorrect, if by so doing the employer would merely confirm that the interim conduct was retaliatory. Attaching actionable retaliation status before the completion of internal

review will encourage employers not to reverse interim decisions out of fear that they will be deemed to have admitted wrongdoing, and therefore subject to liability for attorney's fees and damages. The better alternative is to have potential liability accrue only after the employer has had the opportunity to cure the improper conduct.

In enacting Title VII, Congress favored a policy of "conciliation rather than litigation."[16] Making any minor or interim employment decision actionable encourages litigation, and thus conflicts with that policy and the one advocated by this Court, favoring conciliation through the creation of internal mechanisms for resolving employee grievances. Reading *Ellerth* and *Faragher* as a whole, an interim employment action cannot be within the intended sphere of *actionable* tangible employment actions, including retaliation.

Moreover, adopting the Sixth Circuit's low threshold for actionable retaliation interferes directly with the employer's incentive to adopt the conciliatory, internal measures recommended, encouraged, and blessed by the courts and the EEOC as the appropriate way to implement the purposes of Title VII. If employees can short-circuit the internal review process by bypassing the employer's internal grievance procedures and filing a lawsuit immediately upon the imposition of any interim disciplinary measure, employers are discouraged from proceeding through the review process and constructively deprived of the opportunity to review and possibly reverse interim or unofficial acts. Consequently, any standard that does not incorporate the "affirmative defense" for retaliation complaints encourages employees to bring suit immediately upon imposition of any employment

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[16] *Ellerth*, 524 U.S. at 764.

action that has any negative connotation, no matter how minor or temporary, without appealing the employer's decision and awaiting the results of the internal resolution process and a potential "cure" of the initial action.

Finally, the consequence of a standard that does not include an internal appeal process is an increased litigation risk and an inappropriately expanded role of the courts in supervising employment decisions. As a practical matter, the Sixth Circuit's standard will turn federal judges into corporate managers or human resource departments, required to preside over insignificant or petty complaints by employees, bruised egos, and inconveniences, and to second guess the employer's responses or business decisions. *See Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002) (court's role is not to act as a super-personnel department that second guesses employers' business judgments); *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830 (8th Cir. 2002) (same).[17] This is an inappropriate and unintended role for the federal judiciary system and supports a reversal of the Sixth Circuit's decision.

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[17] *Accord Davis v. Town of Lake Park*, 245 F.3d 1232, 1244 (11th Cir. 2001); *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991); *Billet v. CIGNA Corp.*, 940 F.2d 812, 828 (3d Cir. 1991); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

IV. CONCLUSION

For all the foregoing reasons, SHRM and the NFIB Legal Foundation respectfully request that this Court reverse the Sixth Circuit's decision and hold that neither job transfers to equal paying positions nor interim suspensions that are subsequently overturned through internal complaint procedures constitute actionable retaliation under Title VII, because only a final, ultimate tangible employment action may be the basis for a claim of unlawful retaliation under Title VII.

Respectfully submitted,

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APPENDIX

Excerpt

SHRM Sample Selected Policies From: Employee Handbook

EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

Equal Employment Opportunity has been, and will continue to be, a fundamental principle at XYZ, where employment is based upon personal capabilities and qualifications without discrimination because of race, color, religion, sex, age, national origin, disability, or any other protected characteristic as established by law.

This policy of Equal Employment Opportunity applies to all policies and procedures relating to recruitment and hiring, compensation, benefits, termination and all other terms and conditions of employment. The Human Resources Department has overall responsibility for this policy and maintains reporting and monitoring procedures. Employees' questions or concerns should be referred to the Human Resources Department. Appropriate disciplinary action may be taken against any employee willfully violating this policy.

NON-DISCRIMINATION AND ANTI-HARASSMENT POLICY

[NOTE TO EMPLOYER: This sample policy is intended to be used as part of the "affirmative defense" to liability adopted in the 1998 United States Supreme Court decisions, *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and

Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998). The policy also incorporates most of the suggestions set forth in the June 21, 1999 Equal Employment Opportunity Commission's Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors. The Supreme Court decisions (and the EEOC Guidance) place the burden on employers to take action to prevent and remedy harassment in the workplace in order to avoid liability. Accordingly, we recommend that, at a minimum, the Employer should: include the policy in a prominent place in its employee handbook (if it has one); ensure that employees have effective avenues to bring complaints forward (not just through their supervisor); widely disseminate the policy (independent of the employee handbook) throughout the workplace on a periodic basis to make sure all employees know of its existence and understand the complaint procedure; respond to complaints brought under the policy by promptly and thoroughly investigating them in good faith to determine if violations of the policy have occurred; take prompt, appropriate remedial action to enforce the policy; and ensure that the designated "complaint-recipients" are well-prepared to handle the complaints they may receive and that whoever is assigned to investigate these complaints has sufficient training and experience to do so properly.]

The XYZ Company is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment. Therefore, XYZ expects that all relationships among persons in the workplace will be businesslike and free of bias, prejudice and harassment.

Equal Employment Opportunity

[NOTE TO EMPLOYER: Depending on the states or cities within which your company does business, you may opt not to include some or all of the protected categories (citizenship, marital status, creed, genetic predisposition or carrier status, sexual orientation) listed in brackets below and under "Definitions of Harassment," paragraph "b." as prohibited bases of discrimination or harassment. While New York State law prohibits discrimination or harassment on the basis of a person's marital status, creed, or genetic predisposition or carrier status, and New York City law prohibits discrimination or harassment based on a person's marital status, creed, sexual orientation, or alienage or citizenship status, other state or local laws may not. Other states or localities may prohibit discrimination on the basis of other protected classes which would need to be included in the policy. Therefore, before finalizing this language, you should seek advice from counsel to ensure compliance with state and local laws.]

It is the policy of XYZ to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, national origin, religion, sex (with or without sexual conduct), age, disability, [alienage or citizenship status, marital status, creed, genetic predisposition or carrier status, sexual orientation] or any other characteristic protected by law. XYZ prohibits and will not tolerate any such discrimination or harassment.

Definitions of Harassment

a. Sexual harassment constitutes discrimination and is illegal under federal, state and local laws. For the purposes

of this policy, sexual harassment is defined, as in the Equal Employment Opportunity Commission Guidelines, as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when, for example: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may include a range of subtle and not so subtle behaviors and may involve individuals of the same or different gender. Depending on the circumstances, these behaviors may include, but are not limited to: unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; leering, catcalls or touching; insulting or obscene comments or gestures; display or circulation in the workplace of sexually suggestive objects or pictures (including through e-mail); and other physical, verbal or visual conduct of a sexual nature. Sex-based harassment that is, harassment not involving sexual activity or language (e.g., male manager yells only at female employees and not males) may also constitute discrimination if it is severe or pervasive and directed at employees because of their sex.

b. Harassment on the basis of any other protected characteristic is also strictly prohibited. Under this policy, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of

his/her race, color, religion, national origin, age, disability, [alienage or citizenship status, marital status, creed, genetic predisposition or carrier status, sexual orientation] or any other characteristic protected by law or that of his/her relatives, friends or associates, and that: (i) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities. Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes and display or circulation in the workplace of written or graphic material that denigrates or shows hostility or aversion toward an individual or group (including through e-mail).

Individuals and Conduct Covered

These policies apply to all applicants and employees, and prohibit harassment, discrimination and retaliation whether engaged in by fellow employees, by a supervisor or manager or by someone not directly connected to XYZ (e.g., an outside vendor, consultant or customer).

Conduct prohibited by these policies is unacceptable in the workplace and in any work-related setting outside the workplace, such as during business trips, business meetings and business-related social events.

Retaliation Is Prohibited

XYZ prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports. Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action.

COMPLAINT PROCEDURE

[NOTE TO EMPLOYER: Before issuing this policy, the Employer should decide who will be responsible for receiving employee complaints of harassment, discrimination or retaliation. The Employer should be sure to designate (and identify below) several different "avenues of complaint" for its employees so that if an employee feels uncomfortable discussing the matter with one of the representatives designated to receive complaints, he or she may bypass that "avenue" and choose another. The Employer should keep in mind when choosing those responsible for receiving complaints that the key to an effective complaint procedure is that it is easily accessible and that employees feel comfortable using it. Listed below in brackets are examples of "avenues of complaint" the Employer may wish to designate. It is advisable to designate at least one individual outside an employee's chain of command (such as a member of the Human Resources Department, if the Employer has one). Of course, because size and corporate structure vary from employer to employer, the individual employer can best determine those who will serve as effective "complaint recipients." It is therefore

necessary for the Employer to customize the policy and substitute the appropriate titles or names for the bracketed examples provided below.]

Reporting an Incident of Harassment, Discrimination or Retaliation

XYZ strongly urges the reporting of all incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position. Individuals who believe they have experienced conduct that they believe is contrary to XYZ's policy or who have concerns about such matters should file their complaints with [their immediate supervisor, the Director of Human Resources or any member of the Human Resources Department, or any Ombudsman] before the conduct becomes severe or pervasive. Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other XYZ designated representatives identified above.

[NOTE TO EMPLOYER: Some employers may wish to emphasize in their policy that the Supreme Court decisions and the EEOC Guidance impose an obligation not only on employers, but on employees too. Employees have an obligation to take advantage of the complaint mechanisms offered by employers; and an employee's failure to do so unreasonably (e.g., does not complain, refuses to cooperate in the investigation), will in appropriate circumstances allow the employer to establish an affirmative defense to liability if the employee takes subsequent legal action. An employer can emphasize the employee's obligation in the policy by inserting a "Notice" which may be worded as follows in the

box below. This language may make it more likely that the employee's failure to take advantage of the employer's complaint procedure will be found "unreasonable," thus satisfying one of the elements of the affirmative defense. If you would like to include the "Notice" in your policy, it should be inserted below.]

IMPORTANT NOTICE TO ALL EMPLOYEES:

Employees who have experienced conduct they believe is contrary to this policy have an obligation to take advantage of this complaint procedure. An employee's failure to fulfill this obligation could affect his or her rights in pursuing legal action. Also, please note, federal, state and local discrimination laws establish specific time frames for initiating a legal proceeding pursuant to those laws.

Early reporting and intervention have proven to be the most effective method of resolving actual or perceived incidents of harassment. Therefore, while no fixed reporting period has been established, XYZ strongly urges the prompt reporting of complaints or concerns so that rapid and constructive action can be taken. XYZ will make every effort to stop alleged harassment before it becomes severe or pervasive, but can only do so with the cooperation of its staff/employees.

The availability of this complaint procedure does not preclude individuals who believe they are being subjected to harassing conduct from promptly advising the offender that his or her behavior is unwelcome and requesting that it be discontinued.

The Investigation

Any reported allegations of harassment, discrimination or retaliation will be investigated promptly, thoroughly and impartially. The investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge.

Confidentiality will be maintained throughout the investigatory process to the extent consistent with adequate investigation and appropriate corrective action.

Responsive Action

Misconduct constituting harassment, discrimination or retaliation will be dealt with promptly and appropriately. Responsive action may include, for example, training, referral to counseling, monitoring of the offender and/or disciplinary action such as warning, reprimand, withholding of a promotion or pay increase, reduction of wages, demotion, reassignment, temporary suspension without pay or termination, as XYZ believes appropriate under the circumstances.

* * * *

[NOTE TO EMPLOYER: Some employers may wish to provide a complaining party who is dissatisfied with the resolution of his or her complaint with a mechanism for review by higher management. If this is the case, the

Employer should include the following sentence, with the appropriate reviewing officer(s) substituted for the examples in brackets provided below.]

If an employee making a complaint does not agree with its resolution, the employee may appeal to XYZ's [Executive Director or Chief Operating Officer].

Individuals who have questions or concerns about these policies should talk with [NOTE TO EMPLOYER: insert, for example: the Director of Human Resources or a member of the Human Resources Department.]

Finally, these policies should not, and may not, be used as a basis for excluding or separating individuals of a particular gender, or any other protected characteristic, from participating in business or work-related social activities or discussions in order to avoid allegations of harassment. The law and the policies of XYZ prohibit disparate treatment on the basis of sex or any other protected characteristic, with regard to terms, conditions, privileges and perquisites of employment. The prohibitions against harassment, discrimination and retaliation are intended to complement and further these policies, not to form the basis of an exception to them.

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No. 05-259

In the Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

The International Municipal Lawyers Association (IMLA) is a nonprofit professional organization that serves as a resource for local government attorneys. IMLA is an advocate for the nation's local governments and provides its 1,400 members with information and advice on legal issues facing local governments.

Local governments are within the definition of employers subject to Title VII and its prohibitions on discrimination. 42 U.S.C. § 2000e(a), (b). There are nearly 87,900 local governments in the United States, including over 3,000 county governments, over 19,400 municipal governments, over 16,500 townships, over 13,500 school districts and over 35,100 special districts.[1] With more than 11.5 million full-time employees,[2] local governments account for 10.5% of

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* The parties' consent to amicus briefing is on file with the Clerk of this Court. In accordance with SUP. CT. R. 37.6, amici states that no counsel for either party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[1] *See* U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf.

[2] *See* U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, available at http://ftp2.census.gov/govs/apes/03locus.txt.

full-time employment in the United States.[3] By contrast, state governments account for only 3.5% and the federal government for only 2.2% of full-time employment.[4]

The members of IMLA have an immediate interest in the standards set under Title VII to establish legally cognizable discrimination in employment. More specifically, the threshold standard for adverse employment actions must be clarified and applied uniformly across the United States. A statutory interpretation that protects employees from discrimination while recognizing that not every action taken by an employer may trigger a Title VII claim is necessary.

STATEMENT OF THE CASE

IMLA adopts the Statement of the Case set forth in the Brief of Petitioner.

SUMMARY OF ARGUMENT

It is well-settled that not every perceivable discriminatory wrong on the job is sufficient to state a claim under Title VII. A required element of an employment discrimination claim has always been a threshold showing of an adverse employment consequence. This case requires that the Supreme Court determine what the standard for adverse action in retaliatory discrimination cases should be in light of conflicting standards used in different federal circuits.

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[3] U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2005, available at http://www.bls.gov/iag/government.htm.

[4] *Id.*

In resolving this matter, the Court should hold that the standard for retaliatory discrimination under Title VII be the same as applied to discrimination claims based on race, sex, or other protected classifications. There is nothing in the text of the statute, or any other principled basis, that supports using a different standard for retaliation claims. The standard of "anything that is reasonably likely to deter employees from engaging in protected activity," suggested by the EEOC, should be flatly rejected. Instead, the Court should apply the tests for a "tangible employment action" or "hostile environment" that have evolved in Title VII jurisprudence. This will bring a consistency in standards across the federal circuits, while confirming the equal importance of the general and retaliatory discrimination provisions in the Act.

Moreover, the specific actions at issue in this case, a temporary suspension (reversed through an internal-review process) and a modification of job duties without a reduction of pay, do not rise to the level of a tangible employment action. Accordingly, the decision of the Sixth Circuit should be reversed. Its broad interpretation of Title VII will result in federal courts attempting to adjudicate the subjective preferences of employees when routine job actions are taken. Minor grievances and complaints should be resolved in other forums. For instance, local governments and other employers routinely provide such grievance and appeal procedures to their employees. Those are the places — rather than the federal courts — that should be available to employees with complaints about minor and ultimately non-tangible events, such as those present in this case.

ARGUMENT

A. The test for retaliatory discrimination under Title VII should be the same as applied to discrimination claims based on a protected classification.

Title VII of the Civil Rights Act of 1964, states, in part, that it is unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). The Act also contains a non-retaliation provision that forbids "an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). This Court has never held that the critical phrase — "discriminate against" — has a different meaning in the retaliation provision than it does in the general discrimination provision. The Sixth Circuit has correctly held that it does not. *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789, 799 (6th Cir. 2005); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir. 2000); *Akers v. Alvey*, 338 F.3d 491, 498-99 (6th Cir. 2003). The parties argue over whether one of the two provisions is broader than the other. However, no basis exists to believe that Congress intended that the protection afforded employees after opposing discrimination or filing a charge be greater or less than protection from discrimination on the basis of race, sex, or other protected classification. Under such an interpretation, an employment action that is not a "tangible adverse action" under the general discrimination provision, could be actionable under the retaliatory discrimination provision. For

example, a job transfer might be found to be insufficient to state a race discrimination claim, but sufficiently adverse to state a retaliatory discrimination claim. Should this Court accept the view of the EEOC, that anomalous result is easy to foresee.

This Court should not accept the distinct standard espoused by the Equal Employment Opportunity Commission ("EEOC") for retaliation cases — "anything that is reasonably likely to deter employees from engaging in protected activity is actionable retaliation." EEOC Compliance Manual § 8-11.D.3. The position of the EEOC stated in its current Compliance Manual was not developed contemporaneously with the adoption of Title VII nor in response to the development of case law. The EEOC standard has been followed only by the Ninth Circuit. *Ray v. Henderson*, 217 F.3d 1233-34 (9th Cir. 2000). This Court previously has held the EEOC does not have authority to adopt substantive rules under Title VII. *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 207 (1997). Accordingly, the EEOC guidance is entitled to no deference under the doctrine of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Compliance Manual is entitled to consideration by the courts only to the extent it has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Here, it has no power to persuade at all.

For all these reasons, this Court should reject a standard for retaliatory discrimination claims that is different from the test used in cases involving discrimination based on race, sex and other protected classifications.

B. This Court has held that discriminatory conduct is actionable under Title VII only when it meets the test for "tangible employment action" or the test for "hostile work environment."

The basic elements of a so-called "disparate treatment" claim, whether brought under the general discrimination section of Title VII or the retaliatory discrimination provision, have always included an adverse employment consequence. *See* 1 B. Lindemann & P. Grossman, *Employment Discrimination Law 10-11* (3d ed. 1996). This Court, however, has distinguished claims based on economic or tangible discrimination and claims arising from a hostile or abusive environment that do not require proof of an adverse employment decision. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)and *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). In hostile environment cases, a plaintiff must prove that the workplace is permeated with "discriminatory intimidation, ridicule, and insult," *id.* at 65, that is "sufficiently severe or pervasive to alter the working conditions of the victim's employment and create an abusive working environment," *id.* at 67 (internal brackets and quotation marks omitted), to establish a violation of Title VII.

By contrast, discriminatory treatment that does not involve a hostile or abusive environment must be based on a "tangible employment action." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), (addressing the vicarious liability of employers for discriminatory conduct). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. 742, 761 (Citations, internal brackets and quotation

marks omitted.) "A tangible employment action in most cases inflicts a direct economic harm." *Id.* at 762.

In sum, whether a case is reviewed under the "tangible employment action" doctrine or the "hostile environment" framework, a threshold seriousness of consequence must be shown. This doctrinal requirement is consistent with precedent of this Court under Title VII. *See Harris*, 510 U.S. at 17, ("conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment is beyond Title VII's purview."); *see also Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80-82 (1998) (outlining limits to keep Title VII "from expanding into a general civility code.") *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (isolated incident of harassment that cannot be considered "extremely serious" is not a discriminatory change in conditions of employment). Using threshold standards for severity also honors the maxim *de minimus non curat lex* — "the law cares not for trifles."

C. This case does not involve tangible employment actions.

Because this case was not litigated on a theory of hostile environment, White needed to show that her temporary investigatory suspension and loss of forklift driving duties were tangible adverse employment actions. As discussed in Section A, above, there is no reasoned basis to apply a different test for adverse employment actions under the retaliation provision of Title VII than is used for discrimination based on race, sex or other protected classifications. While the various courts of appeals have labeled the standard for the adverse action element differently, the precedent of this Court illustrates that any claim under Title VII not based on a theory of hostile environment must meet the test for tangible employment

action. *See Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. It bears repeating that:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761.

Even more helpful to defining the concept, this Court has stated that: "A tangible employment action in most cases inflicts *direct economic harm.*" *Id.* at 762 (emphasis added). In reaffirming the direct economic harm aspect of the tangible employment action standard in *Ellerth*, this Court noted its application by the lower courts. *Ellerth*, 524 U.S. at 761, *citing Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (transfer was not a materially adverse employment action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994) (transfer creating a "bruised ego" was not a materially adverse employment action); *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 886-87 (6th Cir. 1996) (transfer with no loss of title, pay or benefits was not a materially adverse employment action); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (reassignment with fewer duties and more stress caused no "materially significant damage").

Since *Ellerth*, lower courts have continued to follow the tangible employment action standard in rejecting Title VII claims that do not include some level of direct economic harm. *Aquilino v. Univ. of Kan.*, 268 F.3d 930, 934 (10th Cir. 2001) (removal from special committee); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (reassignment to

an unfamiliar job with unfavorable working conditions); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239-40 (11th Cir. 2001) (changes in work duties); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000) (change in assignment).

Contrary to these cases applying the tangible action standard, the Sixth Circuit, in the present case, applied its own weak "materially adverse" standard and rejected the "ultimate employment decision" standard used by the Fifth and Eighth Circuits in retaliation cases. *White,* 364 F.3d 789, 801, *citing Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); and *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). The standard used by the Fifth and Eighth Circuit is much more faithful to this Court's tangible employment action standard than the standard actually applied by the Sixth Circuit. The Sixth Circuit's decision is inconsistent with the tangible employment action standard.

1. The temporary suspension

In focusing on a 37-day suspension (reversed under the company's internal review procedure with back pay), the Sixth Circuit emphasized that White would be deprived of her opportunity to recover "interest on the back pay, attorney's fees, emotional suffering, and punitive damages" for her temporary suspension. *White*, 364 F.3d at 802. Compensatory and punitive damages have been available under Title VII only since the Civil Rights Act of 1991. 42 U.S.C. §§ 1981a(b)(3); § 2000e-5(g), (k). A claim about a temporary suspension that was rectified under an internal policy, with full back pay, could not have been made before then, because Title VII remedies were purely equitable. The rationale by the Sixth Circuit, however, misses the point. If claims may go forward simply because a jury might award

damages, then any material-harm threshold has been eliminated. Tests for "tangible," "material," or "ultimate" actions all become irrelevant. Plaintiffs under this approach are not restrained from pursuing damages, including up to $300,000 in compensatory and punitive damages, for adverse actions no matter how trivial or temporary, as long as they muster some evidence of improper motivation. Congress may have intended to increase the incentive for employees to sue when it amended the Title VII damages provisions through the Civil Rights Act of 1991, but there is no reason to think it also intended to sweep away the limitations established by this Court and others on what conduct is actionable.

A different result is dictated under a proper application of the tangible employment action standard. The only actual impact on White was a month-long *delay* in her being paid. While this may have been a personal inconvenience to her, it is just the sort of relatively small economic harm invariably difficult to measure that is part of living in society and should not be made a federal case. *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993). Moreover, the tentative nature of her ultimately reversed suspension (with back pay) belies the tangible nature of that action. *Mattern*, 104 F.3d at 708. Courts have held that interim actions, such as a suspension that is ultimately reversed or a delayed demotion with back pay, are not adverse employment actions. *Bell v. Georgia-Pacific Corp.*, 390 F. Supp. 2d 1182, 1189 (M.D. Fla. 2005), *aff'd.*, 2005 U.S. App. LEXIS 24425 (11th Cir., November 10, 2005); *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000); *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998).

2. Change in job duties

The modification of job duties within an employee's classification, with no reduction in pay or benefits, is not a tangible adverse employment decision — even if the new assignment is "more arduous and dirtier." This case involved the duties of a standard track laborer job, and being the person on her crew to operate the forklift involved no additional pay for White. *White*, 364 F.3d at 803. Modification of job duties to perform other duties normally performed by regular track laborers with no economic harm simply fails to objectively establish a tangible harm. It certainly is possible that White had a preference for driving the forklift. But adjudicating the preferences of employees relating to particular job tasks within a job description is not the work of federal courts.

D. Reversal is necessary to ensure efficient operation of local governments.

This case illustrates the type of routine employment decisions that should not be viewed as tangible adverse actions sufficient to support Title VII claims. It is easy to see the potential difficulty local governments would have if the standard for tangible adverse action were diluted to the level set by the Sixth Circuit. Would every change in duties among firefighters at a particular fire station give potential rise to claims of tangible adverse actions? Likewise, police officers are commonly moved between assignments on a routine basis. In that context, would claims of "arduousness" be sufficient to satisfy the adverse action test? The flexible and ever changing duties of nurses in public hospitals and teachers in public schools present other examples where duties are regularly transferred between employees.

Numerous public positions involve varying duties, all more or less "desirable" depending on the personal preferences of the employee. Only a proper application of the tangible employment action standard will prevent complaints over such subjective employee preferences from supporting cognizable Title VII claims. The proper forums for complaints over intangible and inconsequential matters by public employees are afforded by public employers through civil service systems, in grievance and disciplinary appeals, and other personnel procedures. Even in this case, White's private employer provided procedures for the protection of employees, including a procedure that resulted in the reversal with back pay of her temporary suspension.

Title VII complaints should go forward in federal court only when the facts are serious enough to show a tangible employment decision or a hostile work environment. Permitting federal lawsuits in lesser circumstances will — just as in the private sector — result in overburdening local governments with employment litigation and adversely affect operational efficiency. This case presents an opportunity to avoid such harm to public and private employers alike.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 05-259

In the Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an employer may be held liable for retaliatory discrimination under Title VII for any "materially adverse change in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "ultimate employment decision" (as two other courts of appeals hold).

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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT[1]

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), the Asian American Justice Center, the National Association for the Advancement of Colored People, and the Puerto Rican Legal Defense and Education Fund, Inc., respectfully submit this brief as *amici curiae* in support of Respondent pursuant to Supreme Court Rule 37.3(a) upon the consent of the parties.[2]

INTEREST OF THE AMICI CURIAE

The Lawyers' Committee is a nonprofit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country.

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[1] Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than counsel for the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

[2] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

The Asian American Justice Center ("AAJC") is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal, public policy, advocacy, and community education on discrimination issues. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national nonprofit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as amicus curiae in numerous cases throughout the country concerning the proper interpretation of the civil rights laws. The resolution of this case will have significant impact upon

the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

Amici are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination. In this case, *Amici* seek to ensure that Title VII's substantive bans on discrimination based upon race and other enumerated characteristics have meaning by defining the protections against retaliation to provide "unfettered access to statutory remedial mechanisms," a principle already recognized by the Court and driven by the purpose of the non-retaliation provision of Title VII.

SUMMARY OF ARGUMENT

Amici ask the Court to clarify that the Equal Employment Opportunity Commission's "reasonably likely to deter" standard is the controlling standard for establishing retaliation under Title VII. The EEOC standard should be adopted because it captures the full range of conduct intended to be covered under the plain terms of Title VII's anti-retaliation provision, is consistent with Supreme Court precedent recognizing that for the anti-retaliation provision to have meaning it must provide "unfettered access" to Title VII's substantive protections, and furthers the legislative purpose behind anti-retaliation protections.

In contrast to the "materially adverse" standard, the "reasonably likely to deter" standard avoids the creation of a list of "permissible" harmful actions that can be taken against employees in retaliation for asserting their Title VII rights. Also, the "materially adverse" standard only addresses the actual harm suffered by the employee, while

the "reasonably likely to deter standard" addresses another critical component of retaliation, namely, the threat that the employer's action carries for other employees. Title VII's anti-retaliation provision is concerned with both the individual harm suffered by the targeted employee *and* the chilling effect that the employer's act has on other employees that may raise discrimination claims, and requires a standard that gives weight to both considerations.

This case requires the Court to refine the Title VII anti-retaliation doctrine and determine whether the "materially adverse employment action" standard, as applied by the lower court, is sufficiently precise to be used in retaliation cases, given the myriad forms retaliation may take.[3] The liabilities of this standard are clear. Because the

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[3] Even under the "materially adverse" standard adopted by the Sixth Circuit, Respondent should prevail because the supervisory actions taken against White caused her to suffer sufficient harm to constitute adverse employment actions. However the Sixth Circuit's standard, as discussed, furthers only one purpose of the anti-retaliation provision and ignores the chilling impact that retaliation can have on the actual exercise of the plaintiff's substantive Title VII rights. Petitioner's arguments in favor of the "materially adverse" standard also ignore the plain meaning of Title VII's statutory language and Supreme Court precedent. Also, petitioner's argument that "temporary and tentative" actions cannot give rise to § 704 liability would result in an "ultimate employment action" standard that distorts the plain meaning of the statute, stands the legislative purpose of anti-retaliation provision on its head, and most importantly, ignores the Court's rulings on this issue. *See* Brief of Petitioner ("Petitioner Br.") at 33-35.

construct is borrowed from the § 703 analysis, it focuses heavily on the actual harm suffered by the employee, and ignores the employer's desire to punish not only the current complainant but to quell future reporting. By focusing on the personal and particular harm suffered by the targeted employee, courts may overlook obvious retaliatory actions that are taken against an entire group of employees with the specific intent of injuring the complainant, or additionally to chill other employees. Also, the danger in instituting a standard focused on "material" harm is that this standard requires that the Court determine *ex ante* and without context that some employer action should be excluded from statutory coverage despite its retaliatory purpose. The "reasonably likely to deter" standard avoids these pitfalls; it clarifies the § 704 inquiry and brings unity to a currently conflicted area of Title VII law.

ARGUMENT

I. TITLE VII'S ANTI-RETALIATION PROVISION REQUIRES A BROAD READING OF THE TERM DISCRIMINATION.

A. This Court Has Consistently Interpreted Anti-Retaliation Provisions Broadly.

If the employee's right to claim unlawful discrimination is not absolutely protected, the substantive protections offered by Title VII ring hollow. This Court has already recognized this vital principle and stressed that Title VII's anti-retaliation provision should be interpreted to ensure "unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (interpreting the statutory term "employees" to permit former employees to sue for post-employment retaliation).

The broad reach of Title VII's anti-retaliation provision is consistent with the Court's interpretation of anti-retaliation provisions in other statutes protecting employees' rights. In cases arising under the National Labor Relations Act ("NLRA") and the Fair Labor Standards Act ("FLSA"), the Court has recognized that Congress provided employees with robust protection from employers' retaliatory actions. *See NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972) ("Congress has made it clear that it wishes all persons with information about [prohibited practices] to be *completely free from coercion* against reporting them to the [authorities] . . . . *This complete freedom is necessary* . . . to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and

witnesses) (emphasis added, internal citations omitted); *see also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("By the proscription of retaliatory acts set forth in [the FLSA], . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced."). In the absence of legislative history to the contrary, the Court must conclude that similar concerns inform Title VII's anti-retaliation provision. *See* 110 CONG. REC. 3086, 7210-11, 8453 (1964) (explaining that Title VII was patterned after earlier labor laws, including the NLRA).

The Court has recognized that, as a practical matter, employers can and will use what seems like justified, legal conduct as a method of retaliation. The employer's retaliatory animus is what transforms the action into a violation of an anti-retaliation statute: "if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise legal or even praiseworthy is not controlling." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 (1984) (employer's lawful reporting of immigrant employees to INS for deportation was unlawful retaliation under the NLRA because the supervisor's motive was retaliation); *see also Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 744 (1983) (recognizing NLRB's power to enjoin sham lawsuits when the employer's motive is retaliation). Therefore, to the extent Petitioner alleges that a retaliation claim cannot be based on any action an employer is legally and contractually entitled to take with regard to an employee – including employment changes within the employee's job description or strict enforcement of employer rules – the Court has already rejected this proposition.

Consistent with this view, the Court has acknowledged that retaliation takes a wide variety of forms, and certainly cannot be limited to a set of "ultimate" or "material" employment actions. In interpreting other civil rights statutes, this Court has also held that the word "discriminate" is a "term that covers a broad range of intentional unequal treatment." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 125 S. Ct. 1497, 1505 (2005) ("by using such a broad term, Congress gave the statute a broad reach"). In recent years, the Court has considered retaliation claims involving a negative employment reference, *Robinson*, 519 U.S. 337, a transfer, *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), and suspension, improper discipline, and failure to train claims, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Also, Congress continues to recognize that robust protection from retaliation is necessary because employers continually adapt their behavior to retaliate within the confines of the law. *See, e.g.*, S. Comm. on the Judiciary, The Corporate Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, at 19 (2002) (explaining that the whistleblower protections ultimately enacted in § 806 of the Sarbanes-Oxley Act of 2002 were necessary because "[u]nfortunately, ... most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law").

Collectively, these authorities demonstrate the need for an expansive standard to address retaliation by employers effectively. In keeping with this precedent, the Court should adopt the "reasonably likely to deter" standard as the proper interpretation of Title VII's anti-retaliation provision. *See*

American Tobacco Co. v. Patterson, 456 U.S. 63, 77 (1982) (rejecting petitioner's attempt to limit Title VII provision's interpretation as contrary to the statute's plain language, inconsistent with the Court's prior cases, and contrary to national labor policy).

B. The Supreme Court's Jurisprudence Recognizes That Title VII's Plain Language Requires An Expansive Definition Of Retaliatory Discrimination.

The Court's recognition that anti-retaliation provisions are intended to provide "unfettered access" to statutory rights is no doubt driven by its clear understanding of their legislative purpose and by common sense but also, at its heart, is driven by a reading of the plain language of Title VII. Section 704(a), Title VII's anti-retaliation provision, makes it "an unlawful employment practice" for an employer to "discriminate" against an individual who has filed or assisted in the prosecution of a Title VII claim, or who has opposed a discriminatory practice that violates the statute. *See* 42 U.S.C. § 2000e-3(a) (2000). "As in all cases involving statutory construction [the Court's] starting point must be the language employed by Congress, and [it] assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intent to the contrary, that language must ordinarily be adopted as conclusive." *American Tobacco*, 456 U.S. at 69 (internal quotations omitted).

In Title VII's anti-retaliation provision, the word "discriminate" means to treat differently, and Congress intended this term to have its ordinary meaning: "[T]he

concept of discrimination . . . is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor . . . ." 110 CONG. REC. 7212, 7213 (1964) (Interpretive Memorandum of Title VII by Sens. Clark and Case). The Sixth Circuit rejected this broad reading, and incorrectly looked to § 703 for guidance, despite obvious differences between the two sections. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 799 (6th Cir. 2004) (*en banc*). The statute's plain terms defy this reading. *See Robinson*, 519 U.S. at 341 (explaining that a statute is interpreted based on its "plain" terms, distilled "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

First, the use of the term "discriminate" in § 704(a) is unambiguously unconditional, as compared to § 703, which specifies that its focus is discrimination with respect to the "terms, conditions, or privileges of employment." The lack of limiting language in § 704(a) is intentional, and should be taken into account when interpreting the statute. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (interpreting Title VII's provisions: "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citations and quotations omitted). As Judge Clay pointed out in the Sixth Circuit opinion, "Congress could quite easily have placed the same limitations on § 704(a) as it did on § 703(a), yet it chose not to do so." *White*, 364 F.3d at 810 (Clay, concurring).

Second, § 704 which is entitled "Other Unlawful Employment Practices," is separate and distinct from § 703, which is entitled "Discrimination *Because Of* Race, Color, Religion, Sex or National Origin" (emphasis added). Section 703's enumerated unlawful employment practices capture the illegal acts that constitute discrimination against a discrete set of protected class groups. Section 704 deals with an entirely different phenomenon, retaliation based on statutorily protected activity. The inclusion of the word "discriminate" in both sections does not establish that they have the same meaning. Indeed, "since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption [that they have identical meaning] readily yields" when the "words, though in the same act, are found in . . . dissimilar connections." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

Section 703's unlawful employment practices solely define discrimination *based on* race, sex, color, religion, and national origin. Retaliation was conspicuously set apart as an "other unlawful employment practice[]" under a separate section. One must conclude that Congress considered retaliatory discrimination distinct from the primary employment discrimination category under § 703. The importance of this distinction, between the primary right and the anti-retaliation provision ensuring its exercise, is

reaffirmed by the similar structure of other statutes protecting workers' rights.[4]

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[4] Numerous worker protection statutes contain separate anti-retaliation provisions that broadly prohibit employers from "discriminating" with the intent to retaliate. *See, e.g.*, 29 U.S.C. § 158(a) (the NLRA provides "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act"); 29 U.S.C. § 215(a)(3) (the FLSA provides "[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee [for exercising rights under the statute]"); 29 U.S.C. § 623(d) (the Age Discrimination in Employment Act provides "It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section"); 42 U.S.C. § 12203(a) (the Americans with Disabilities Act provides "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act. . . . It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act."); 29 U.S.C. § 2615 (the Family and Medical Leave Act provides "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this [Act]. . . . It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this [Act]."); 29 U.S.C. § 660(c) (the Occupational Health and Safety Act provides "No person shall discharge or in any manner discriminate against any employee because such employee has [exercised rights under the statute]"); 29 U.S.C. § 1140 (the Employee Income and Retirement Security Act provides "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or

The same logic informs Supreme Court precedent, as the Court has recognized specifically in the Title VII context, that retaliation is not a subset of § 703 discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799-800 (1973) (holding that a race discrimination claim could proceed where the same evidence could not sustain a claim of retaliation). Also, because retaliation "is separate from direct protection of the primary right and serves as a prophylactic measure to guard the primary right," a retaliation claim may succeed where a discrimination claim fails. *See Jackson*, 544 U.S. 167, 125 S. Ct. at 1513 (Thomas, J., dissenting) (discussing Title IX sex discrimination). Consistent with this view, the Court should treat, and has treated, retaliatory discrimination under § 704(a) as distinct from discrimination under § 703.

Third, even if the term "discriminate" in § 704(a) is read in the context of its use in § 703, that section uses the phrase "or otherwise to discriminate," making it clear that the word "discriminate" was intended to be read broadly to capture behavior not specifically listed in the text. *See, e.g., Scrivener*, 405 U.S. at 124 (in interpreting the NLRA, noting that "[o]n textual analysis alone, the presence of the preceding words 'to discharge or otherwise discriminate' reveals, we think, particularly by the word 'otherwise,' an intent on the part of Congress to afford broad rather than narrow protection to the employee"). Under any of these readings, Title VII's plain language indicates that Congress

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beneficiary for exercising any right to which he is entitled under the [Act]").

intended for retaliation-based discrimination to be a broad category.

Although the plain text of the statute shows that § 704(a)'s drafters made no attempt to define the scope of potential retaliatory discrimination *ex ante*, the language does not permit a court to simply import the § 703 definition of discriminate into the § 704 context, as suggested by the Sixth Circuit. Rather, the only way the Court can give effect to this broad definition is to employ a fact specific test that can account for the array of potential employment practices that constitute retaliation.

C. The EEOC Standard Is Entitled To Deference Because It Is Consistent With The Statute's Plain Meaning, Supreme Court Precedent, And The Statute's Legislative Purpose.

Courts rely on the EEOC's interpretations to inform their understanding of Title VII. *Meritor Savs. Bank v. Vinson,* 477 U.S. 57, 65 (1986) (explaining that agencies charged with enforcing statutes serve as a body of expert opinion on which Courts can rely). The EEOC's interpretation of § 704(a) should be adopted because it has the "power to persuade" as described in *Skidmore*, when one considers "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all th[e other] factors which give it the power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The standard enunciated in the EEOC Compliance Manual is based on a thorough, close reading of the statute's plain terms, giving them their clear and logical

meaning. Contrary to the Sixth Circuit's holding, nothing in the plain language demonstrates that the Court should develop a pre-determined "materiality standard." Rather, the only valid limiting boundary on the term "discriminate" should be based on what the statute is designed to prohibit, namely, actions that are "reasonably likely to deter" protected activity.

Contrary to Petitioner's assertion, the EEOC standard is consistent with the Commission's long-standing view that § 704(a) affords "exceptionally broad" protection to individuals seeking to assert their Title VII rights or otherwise participate in the enforcement process. *See, e.g., 2 EEOC Compliance Manual*, 8-II.D.3 (May 1998) ("The anti-retaliation provisions are exceptionally broad."); *2 EEOC Compliance Manual*, § 614.1(a) (Jan. 1988) ("This section . . . reaffirms that the Commission's policy and position on protecting individuals [from retaliation] is exceptionally broad."); Brief for the United States and the EEOC as Amici Curiae in Support of Petitioner, *Robinson v. Shell Oil Co.*, No. 95-1376 (1995) at 13-14 ("EEOC Robinson Amicus Br.") ("[§704(a)] broadly prohibits [discrimination] against an employee because he or she has made a charge . . . ."). Also, the EEOC has made it clear that under this interpretation petty slights or trivial annoyances that would not chill an ordinary person from engaging in protected activity would not be actionable under § 704(a).[5] *See 2 EEOC Compliance Manual*, 8-II.D.3 (May 1998).

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[5] *See also* Brief of EEOC as Amicus Curiae in Support of Plaintiff-Appellee, *White v Burlington Northern & Santa Fe Ry. Co.*, Nos. 00-

Notwithstanding Petitioner's selective quotations from the Manual's provisions, the EEOC signaled as early as thirty years ago its concern that "[e]very instance of unremediated retaliation against persons who engage in Section 704 (a) opposition . . . has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination." *EEOC Compliance Manual* (CCH), § 491.2 (1975). *See also* EEOC Decision 74-77, 1974 WL *3847 (Jan. 18, 1974). Therefore, as the EEOC further explained, § 704(a) was not only concerned with the specific harm suffered by the individual employee, but with the concern that if retaliation "were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination." *2 EEOC Compliance Manual*, § 614.1(d) (Jan. 1988).[6] The "reasonably likely to deter" standard is

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6780 & 01-5024 (6th Cir. 2004) at 9 (*citing Primes v Reno*, 190 F.3d 765, 767 (6th Cir. 1999). This limitation on § 704(a) retaliation is consistent with the plain terms of the statute, as all statutes are interpreted to contain an implicit limitation, but that boundary that must be delineated in a manner that is consistent with the statute's specific purpose. *See Wisconsin Dep't of Revenue v. Wrigley*, 505 U.S. 214, 231 (1992).

[6] Previous versions of the Compliance Manual do not support the assertion that the Commission conflated the kinds of employment discrimination prohibited by § 703 with the forms of retaliation prohibited by § 704 in the years prior to its adoption of the "reasonably likely to deter" standard. Prior Manuals simply stated that retaliation "can take many forms." *2 EEOC Compliance Manual*, § 614.7 (Jan. 1988).

simply a distillation of a proposition that always informed the Commission's understanding.[7] *See United States v. Mead Corp.* 533 U.S. 218, 235 (recognizing that current interpretation's "fit with prior interpretations" weighs in favor of persuasiveness of Commission's reading).

Other factors counsel in favor of adopting the EEOC's position. The "reasonably likely to deter" standard demonstrates a careful consideration of the various circuits' interpretations of the "materially adverse standard," setting forth the standard's strengths and liabilities in light of the agency's experiences. EEOC guidelines provide the courts with a source of expert opinion. As an "administrative interpretation of the Act by the enforcing agency," *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), the EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore*, 323 U.S. at 140); *see also Meritor Savs. Bank*, 477 U.S. at 65 (same); *Christensen v. Harris County*, 529 U.S. 576, 597 (2000) (Breyer, J.,

[7] *See 2 EEOC Compliance Manual*, § 614.1(b) (Jan. 1988) ("retaliation against a charging party or complainant can interfere with the investigation of the original charge or complaint; it can also have a chilling effect on the willingness of others to cooperate in . . . investigations conducted by the Commission . . . ."); *see also* EEOC Robinson Amicus Br. at 35 ("Acts of retaliation motivated to punish employees for filing discrimination charges threaten to impair the effectiveness of the administrative machinery for investigating, punishing, and deterring violations of Title VII. The threat of retaliation is likely to chill employees' willingness to file charges and to co-operate with the EEOC in investigating discrimination.").

dissenting) ("If statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experienced-based views of expert agencies.").

II. SOUND PUBLIC POLICY SUPPORTS ADOPTION OF THE "REASONABLY LIKELY TO DETER" STANDARD.

A. The EEOC Standard More Faithfully Interprets The Intent Of The Statute Than The "Materially Adverse" Standard, Because It Shifts The Focus To The Deterrent Effect Of Employer Actions.

The "reasonably likely to deter" standard precludes the creation of a category of "permissible" retaliation that nonetheless would chill or punish the exercise of Title VII rights. The EEOC has indicated that the proper standard for identifying actionable retaliation is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party and others from engaging in protected activity," explaining that this standard comports with the "exceptionally broad" protections provided by the various statutory anti-retaliation provisions that are under its purview. *2 EEOC Compliance Manual,* 8-II.D.3 (May 1998). As the EEOC explains, any other standard might "permit some forms of retaliation to go unpunished and would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions." *Id.*

Unlike the "materially adverse" standard, the "reasonably likely to deter" standard avoids providing employers with a judicially prescribed list of activities to hide behind while permissibly retaliating against their employees, thus deterring them from challenging illegal discrimination. In fact, adopting the "reasonably likely to deter" standard should actually *decrease* filings by creating a meaningful incentive for employers to refrain from engaging in any type of retaliatory activity.

The Commission appropriately resists setting forth absolute boundaries about what constitutes actionable conduct in recognition of the myriad forms that retaliation may take. The majority of circuits agree, as "[t]he law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit." *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000) (recognizing that a "wide array of disadvantageous changes in the workplace constitute adverse employment actions"); *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) ("Congress recognized that job discrimination can take many forms, and does not always manifest itself in easily documentable sanctions such as salary cuts or demotions."); *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (explaining that the central inquiry is whether the challenged action would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."); *see also Rochon v. Gonzales*, No. 04-5278, 2006 WL 463116, at *18-19 (D.C. Cir. Feb. 28, 2006) (adopting a broad interpretation of § 704 consistent with the EEOC "reasonably likely to deter" standard); *Passer v. American Chem. Soc'y*, 935 F.2d 322,

331 (D.C. Cir. 1991) (parallel retaliation provision of the ADEA "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion").

The "reasonably likely to deter" standard also would bring consistency and clarity to a currently muddled and confused area of case law. Application of the materially adverse standard has resulted in uneven and sometimes indefensible inconsistencies within individual circuits about the rationale for recognizing employer liability. *See White*, 364 F.3d at 801 (pointing out inconsistencies in the Fifth and Eighth Circuits). The virtue of the "reasonably likely to deter" standard is that it makes the competing considerations more clear in the Court's analysis. The Court must ensure "unfettered access" to the process. It is impossible to determine whether a change in an employee's responsibilities is sufficiently adverse to constitute retaliation without an understanding of the context in which the claim arose. Not all transfers are equal; some are sufficiently punitive in effect to be retaliation.

Additionally, it is impossible to judge what would likely deter future complaints without considering how the proposed action, if threatened to others, might discourage them from engaging in protected activity. A less severe sanction might deter witnesses when it would not sway the primary complaining employee. *See Washington*, 420 F.3d at 662 (explaining that "it takes less to deter an altruistic act than to deter a self-interested one...; [t]he sort of [employer] response deemed immaterial to self-interested charges [raised by plaintiff] could be material to others, and thus could be deemed discriminatory").

Circuit case law also demonstrates that the "materially adverse standard" cannot be used to draw a pre-established baseline to identify punitive decisions. Several circuits have expressly conceded this point, explaining that the standard requires a fact specific inquiry. *See Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("Because there are no bright-line rules [under the materially adverse standard], courts must pore over each case to determine whether the challenged employment action reaches the level of adverse."); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 273-74 (7th Cir. 1996) ("The question whether a change in an employee's job or working conditions is materially adverse, rather than essentially neutral, is one of fact."); *Washington*, 420 F.3d at 661 (the term "material is one of those protean words that resists further definition. This holds open some potential to say that an act that would be immaterial in some situations is material in others.").

Simply put, one cannot exhaustively catalogue abuses of employer power prior to knowing what tools the supervisor has at his or her disposal, and without understanding how employees rely upon the workplace benefits or rules being used for the purpose of retaliation. The EEOC standard captures the deleterious effects these actions have on employees, much of which goes unaddressed under the various circuits' standards. The "reasonably likely to deter" standard also avoids another stumbling block courts face under the "materially adverse" analysis – namely the circumstance where the action is undoubtedly intended to punish or suppress the exercise of Title VII rights, but fails to constitute a materially adverse employment action.

B. Adopting The "Reasonably Likely To Deter" Standard Will Not Result In A Flood Of Litigation.

In an attempt to distract the court from the real issue presented, the petitioner and their *Amici* raise the tired argument that any standard other than the one they propose will flood the courts. *Amici* supporting Petitioner rely upon a single statistic to argue that if the Court adopts a standard for retaliation that does not require a "materially adverse employment action," then the number of Title VII retaliation charges filed with EEOC "can be expected to increase even more dramatically, with resulting effects on caseloads not only of the EEOC, but of the Federal Courts themselves." Brief Amici Curiae of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America in Support of Petitioner at 11.

There is no reason to believe that any upward trend in retaliation findings is connected to the substantive standard set by the Court or the EEOC, or that adopting the "reasonably likely to deter" standard would create a burdensome increase in filings of retaliation complaints. In fact, after the EEOC publicized its "reasonably likely to deter" standard in 1998,[8] there was no appreciable jump in the number of retaliation cases filed with the EEOC. See infra at 24, n.9. Since there was no significant increase when the EEOC adopted the standard, there is no reason to believe

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[8] Prior to 1998, the Manual simply stated that retaliation "can take many forms."

that there will be a change if the courts formally adopt it now.

The real reasons for the increase in EEOC filings alleging retaliation during the cited time period are not clear (although some of the increase in the early 1990s is almost definitely a reflection of the passage of the Americans With Disabilities Act in 1991, an increase in education about the right to file with the EEOC, and generally an increased population in the workforce.) A nonpartisan statistical analysis by researchers from the American Bar Foundation concluded that

> the reason for the rising number of retaliation charges is less obvious [than the reason for the rising number of disability claims]. It may reflect the rising proportion of charges that involve dismissal, a finding documented . . . for the period from 1965 to 1989. It may also reflect an increasing tendency for plaintiffs (and their lawyers) to add retaliation as a claim in discrimination disputes. It may reflect more retaliatory behavior by employers. Without an in-depth analysis of claims over time and the employment contexts that produce them, we are left to speculate about the reasons for this shift.

Laura Beth Nielsen and Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination as a Claiming System*, 2005 Wis. L. Rev. 663, 690-91 (2005). In other words, the cause for the increase in retaliation filings is unclear. The fact that the steady increase in retaliation charge filings before the EEOC remained steady when the EEOC changed its standard for retaliation suggests that the

number of filings is not likely to greatly increase. Further, there is no link between increased retaliation filings with the EEOC and increased federal court filings.

Petitioner and its *Amici* attempt to create an unjustified fear that the federal courts will be flooded with discrimination cases. However, the number of employment cases filed in federal court has consistently *decreased* over the past six years, despite the increase in EEOC retaliation filings. According to Federal Judicial Caseload statistics for the year 2000, 21,928 employment civil rights cases were filed in Federal Court. This number has decreased *every* year since then. In 2005, 19,689 employment civil rights cases were filed. The United States Courts of Appeals saw a similar decrease, from 2,997 appeals in 2001 to 2,373 in 2005.[9]

Furthermore, many other filters and mechanisms will prevent abuse of Title VII's anti-retaliation provision. Proof that the defendant's conduct was "reasonably likely to deter" the plaintiff from engaging in protected activity is just one of the elements of the plaintiff's *prima facie* case of retaliation. The plaintiff must also establish that she engaged in protected activity, that the defendant had knowledge of the protected activity, and that there was a causal connection between the protected activity and the defendant's conduct. *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 381 (6th Cir. 2002) (applying the *McDonnell Douglas* burden-shifting

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[9] *See U.S. Courts Statistical Reports*, http://www.uscourts.gov/library/statisticsalreports.html (last visited March 8, 2006).

framework). The causal link, the mental state of the employer, and the limited scope of protected activity all provide additional filters against excessive retaliation filings.

C. Promoting Conciliation Does Not Trump Title VII's Anti-Retaliation Protections.

Petitioner wrongly contends that the "reasonably likely to deter" standard will compromise employers' attempts at conciliation, which it alleges was central to Congress's vision of Title VII. A review of the statute's legislative history shows that Congress recognized that the potential for conciliation in addressing discrimination was limited, particularly where employers dealing with claims would be forced to accept that some of their formerly accepted practices constituted discrimination. *See* H.R. Rep. 92-238, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144 ("It was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially 'human' problem. Litigation, it was thought, would be necessary only on an occasional basis. . . . Experience, however, has shown this view to be an oversimplification, incorrect in its conclusions.") The same concerns arise here where employers could ignore employee complaints about retaliatory exercise of supervisory power when it appears the conduct complained of is justified by workplace rules or the employee's job description. A statute that makes these claims actionable will require that employers advise and supervise lower level supervisors to ensure they do not use

the power delegated to them to retaliate against persons engaging in conduct protected by Title VII.[10]

D. Adopting the "Reasonably Likely To Deter" Standard Also Avoids The "Catch-22" That Petitioner's Standard Would Create For Employees

Petitioner's standard wants to have it both ways. They argue that the decisions here were not final employer actions so under their "ultimate employment action" standard, the decisions would not be actionable. In addition to ignoring the Court's ruling that the anti-retaliation provisions are to provide "unfettered access" and ignoring the purpose of anti-retaliation provisions, Petitioner's standard creates an unworkable procedural nightmare. When employees made these exact arguments in attempting to extend the statute of limitations for filing with the EEOC, the Court explicitly rejected them. *See Electrical Workers v. Robbins & Myers, Inc,* 429 U.S. 229 (1976). The Court

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[10] The agency principles described in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), require that employers should not be permitted to block employee's retaliation claims based on the assertion that they must be filtered through an internal grievance mechanism. A supervisor's misconduct demonstrates that the employer has already squandered its opportunity to avoid liability by failing to offer effective prophylactic training. *Faragher*, 524 U.S. at 803 ("Recognition of employer liability [for] discriminatory misuse of supervisory authority . . . is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.")

should reject these arguments now that the employer thinks they cut in its favor. If Ms. White's grievance process had taken 370 days instead of 37 days, and if the outcome been adverse to her, there is no doubt that Petitioner would have claimed that Ms. White waited too long to file an EEOC charge.

Moreover, ruling in favor of Petitioner would result in inconsistent case law. In *National R.R. Passenger Corp. v. Morgan*, the Court explicitly held that an adverse employment action occurs when it "happen[s]" and not after the resolution of an internal review procedure that may or may not undo that decision. 536 U.S. at 110-11 (collecting cases). This holding is consistent with *Electrical Workers* and its progeny.[11]

Specifically, in *Electrical Workers*, the Court held that the unlawful employment practice occurred on the date the plaintiff was removed from her employment, not at the conclusion of an internal review process pursuant to the collective bargaining agreement ("CBA"). 429 U.S. at 234-35. In making its ruling, the Court relied heavily on facts that are remarkably similar to the facts in this case: "[The plaintiff] stopped work and ceased receiving pay and benefits as of that date. Unless the grievance procedure

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[11] *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) (in holding that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods," noting that "[t]he grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made") (emphasis in original).

resulted in her reinstatement, she would not be entitled to be paid for the period during which the grievance procedures were being implemented." *Id.* at 235-36. In *Electrical Workers*, the plaintiff also affirmatively requested review of her termination. Similarly, Respondent White stopped receiving pay on the date of her suspension and, unless she challenged her suspension, she would not have been entitled to back pay. Pursuant to the CBA governing Respondent White's employment, one must "make written request for [an] investigation" of the discipline within 15 days. CBA R.91 (JA 56). Petitioner admits that Respondent White affirmatively "requested a Rule 91 investigation of the suspension[.]" Petitioner Br. at 6. In both *Electrical Workers* and the instant case, the internal review process was not "required." *See* 429 U.S. at 235, n.5. Applying this well-established precedent to the matter *sub judice* demonstrates that Respondent White had a valid claim of retaliation on the day she was suspended. Petitioner's position is inconsistent with this precedent.[12]

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[12] Petitioner uses semantics to distinguish *Electrical Workers* and its progeny, arguing that this case law applies only to "grievances" and that the present case involves an "investigation." Petitioner distinguishes these two terms by claiming that the "initial investigatory suspension was not the official decision of the company," Petitioner Br. at 33, but that a grievance involves dissatisfaction with an employer's final decision. Petitioner further alleges that the use of the word "decision" in the CBA when describing the final outcome of the investigation of discipline necessarily renders any discipline preceding an investigation as tentative and non-final. *See* Petitioner Br. at 34. However, nothing in the text of the CBA indicates that only "management's ultimate adoption of a supervisor's recommendation would be deemed the relevant statutory 'occurrence.'" *Electrical Workers*, 429 U.S. at 234. Furthermore, the

This awkward attempt by Petitioner and its *Amici* to create a "Catch-22" for the employee should be summarily rejected by the Court. Under their analysis, if an employee filed a charge at the time of the action, it would be considered premature. However, if the employee waited until the conclusion of a lengthy investigation or grievance process, it would be considered untimely under *Electrical Workers*. For this reason, the Court should not adopt the untenable framework suggested by the Petitioner and its *Amici*.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to rule that the "reasonably likely to deter" standard is the controlling test for determining whether a retaliation claim is cognizable under § 704(a), and to hold that the Sixth Circuit correctly determined that the transfer and suspension White suffered in this case are sufficient to sustain her claim of retaliation.

Supreme Court has clarified that the holding in *Electrical Workers* does not apply just to a grievance procedure, but instead implicates all "method[s] of collateral review of an employment decision[.]" *Delaware State College*, 449 U.S. at 26.

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BRIEF FOR NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AARP, EQUAL JUSTICE SOCIETY AND NATIONAL DISABILITY RIGHTS NETWORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

All *amici* here, either organizationally or through their members, represent individuals under Federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Family and Medical Leave Act. *Amici* include

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

non-profit organizations that advocate in favor of vigorous enforcement of these laws and advise individuals of their rights under them, and their memberships include attorneys who represent clients in litigation involving claims under these statutes.

Amici know from experience that scrupulous adherence to anti-retaliation strictures is essential if underlying statutory prohibitions (such as Title VII's ban on racial discrimination in employment) are to be meaningful. *Amici* are vitally concerned that these laws be read as written and in particular that the shelter from retaliation under Title VII be as broad as Congress intended.

Fuller statements of interest for all *amici* are included in the appendix to this brief.

STATEMENT

Respondent Sheila White was the only woman employed in the Maintenance of Way department at the Tennessee Yard of petitioner Burlington Northern & Santa Fe Railroad Company (BNSF). White's immediate supervisor and several other employees did not think that a woman should work there, and the supervisor and a co-worker admitted at trial that there was a "general anti-woman feeling" in the workplace. After about three months of working in this environment, White complained about discrimination based on her sex. Ten days later, her job duties were changed. Instead of spending most of her time sitting down, operating a forklift, she now had to perform tasks that her co-workers agreed were dirtier and far more arduous, involving heavy lifting. The jury did not believe BNSF's explanation for altering White's duties and found that the company initiated the changes to retaliate against her for reporting discrimination.

White filed a charge with the EEOC, and then later filed a second charge alleging retaliation. One week after she filed the retaliation charge, she was summarily suspended without

pay. She spent 37 days off work, unpaid, before BNSF management conceded that she had not done anything wrong. Finally, she was reinstated with back pay, after having spent the entire holiday season (December 11, 1997—January 16, 1998) without pay and uncertain whether she would ever be reinstated. Again, the jury did not believe BNSF's explanation and found that this unpaid suspension was also intended to retaliate against White for protesting discrimination. In addition, the jury found that White had suffered $43,250 in compensatory damages over and above the back pay she received after reinstatement.

A divided panel of the Sixth Circuit reversed, saying that neither retaliatory action was sufficiently "adverse" to state a claim for relief. The Sixth Circuit, sitting *en banc*, reinstated the verdict and held that the change in duties and the unpaid suspension were each, standing alone, sufficient injury for White to state a claim for relief under Title VII. *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789 (6th Cir. 2004) (*en banc*).[2]

SUMMARY OF ARGUMENT

This case focuses on the type of employer conduct that is actionable under Title VII. If BNSF has its way, companies will be free to announce that any employee who complains of discrimination will be immediately suspended without pay, or will be given dirtier, more arduous duties, or both. Such conduct, though, violates both the text of Title VII and this Court's consistent reading of the anti-retaliation language in the Act and other legislation affecting the workplace.

Section 704(a) of Title VII (42 U.S.C. § 2000e-3(a)), which prohibits retaliation, serves a crucial role: "Maintaining unfettered access to statutory remedial mechanisms." *Robinson v.*

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[2] The "Background" section of the *en banc* decision, *White*, 364 F.3d at 792-94, is the source for the facts in this Statement.

Shell Oil Co., 519 U.S. 337, 346 (1997). Unlike § 703(a) (42 U.S.C. § 2000e-2(a)), which bars discrimination in employment on the basis of race, sex, religion or national origin, § 704(a) is not limited to employer conduct arising in the context of employment. *See, e.g., Robinson* (applying § 704(a)'s protections to former employee), and *Rochon v. Gonzales*, ___ F.3d ___, 2006 WL 463116 (D.C. Cir. Feb. 28, 2006) (Ginsburg, C.J.) (holding actionable the allegedly retaliatory refusal of the FBI to investigate a threat on plaintiff's life).

The difference between the two provisions is evident in the statutory text. Under § 703(a), discriminatory conduct by an employer is actionable if it affects a worker's employment status in myriad ways—if it (1) involves compensation or other terms, conditions or privileges of employment, or (2) deprives or *tends to deprive* a worker of employment opportunities, or (3) adversely affects his status as an employee in any other way. As is evident, § 703(a) sweeps broadly, but it is confined to actions related to employment.

Section 704(a) is broader still, simply prohibiting employers from discriminating against employees because they have protested practices that are unlawful under Title VII, but without limiting the prohibited discrimination to the field of employment. The standard for actionability under § 704(a) is accordingly different, centering on conduct that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon*, 2006 WL 463116 at *8 (citation omitted).

In the present case, respondent White challenges employment-related conduct—an unpaid suspension and a reassignment—and she satisfies the standard for bringing claims under § 703(a), as well as § 704(a). In these circumstances, the Court need not define the outer limits of actionability under the latter.

1. *Section 704(a). Amici* represent workers in employment litigation day in and day out. We have encountered first hand

the rich variety of stratagems used by employers to punish workers who complain about discrimination and to deter them—and other workers who might support them—from exercising their statutory rights. These retaliatory practices run a wide gamut, from firings and threats of firing, to the filing of phony criminal reports with the police and the institution of frivolous civil litigation, to altering a worker's hours to prevent him from picking up his young son, who was dependent on his dad to get home after school. Unchecked, these practices and their numerous kin would gut effective enforcement of Title VII and shatter the promise of workplace equality that lies at the heart of the Act.

Fortunately, this Court has consistently given a broad reading to § 704(a) and similar anti-retaliation provisions in other statutes regulating employment. In particular, those decisions focus on penalizing employer conduct that could deter employee participation in remedial processes.

Most significant, the Court in *Robinson*, 519 U.S. at 346, which considered whether § 704(a)'s protections extend to former employees, agreed with the EEOC that excluding ex-employees "would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to *deter* victims of discrimination from complaining to the EEOC" (emphasis added). The Court said that the Commission's "arguments carr[ied] persuasive force given their coherence and their consistence with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." *Id.*

In so holding, the Court cited two cases, one arising under the National Labor Relations Act, *National Labor Relations Board v. Scrivener*, 405 U.S. 117 (1972), and the other under the Fair Labor Standards Act, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). Both cases viewed a broad reading of anti-retaliation provisions as essential to effective enforcement. Thus *Scrivener* explained that "com-

plete freedom [from retaliation] is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" 405 U.S. at 122 (citation omitted). And *Mitchell* noted that Congress did not seek to secure compliance with the FLSA through "detailed federal supervision or inspection of payrolls," and instead "chose to rely on information and complaints received from employees." 361 U.S. at 292. In these circumstances, "[p]lainly, effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances." *Id.*

The Court's approach to retaliation is fully consistent with the expansive reach of § 704(a), which bars employers from discriminating against workers for complaining about bias or assisting others who do, without in any way limiting the types of discrimination covered by the prohibition. The District of Columbia Circuit, citing *Robinson* and the EEOC Compliance Manual, recently held that "an alleged act of retaliation by the Government need not be related to the plaintiff's employment in order to state a claim of discrimination under Title VII." *Rochon*, 2006 WL 463116 at *7. In so ruling, the court pointed to "the decisions of the four other circuits that do not require that a retaliatory action be employment-related in order to state a claim under Title VII." *Id.* at *6.

Citing the law in other circuits, *Rochon* recognized that § 704(a)'s standard of actionability should focus on deterrence. The court said that "in order to support a claim of retaliation a plaintiff must demonstrate the 'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at *8 (citation omitted).

In *Rochon*, the court itself was able to determine that the conduct alleged—refusal to investigate a death threat—"meets this threshold of significance." *Id.* Here, as else-

where in our legal system, close calls on reasonableness are the province of the jury.

2. *Section 703(a).* BNSF errs in saying that §§ 703(a) and 704(a) should be construed in identical fashion. It compounds this error by reading § 703(a) too narrowly in the first instance and then seeking to import its cramped construction into § 704(a).

An "adverse employment action [covered by § 703(a) includes] 'discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment,' as subsection [703](a)(1) puts it, or 'limiting, segregating, or classifying . . . employees . . . in any way that would deprive or *tend to deprive* any individual of employment opportunities or otherwise adversely affect his status as an employee,' as subsection [703](a)(2) puts it." *McDonnell v. Cisneros*, 84 F.3d 256, 258-59 (7th Cir. 1996) (Posner, C.J.) (emphasis added). This language is confined to the employment setting, but it too is expansive, as the Court has confirmed: "the language of [§ 703(a) of] Title VII is not limited to 'economic' or 'tangible' discrimination" and instead is intended "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (citations and some internal quotation marks omitted). The precise contours of the challenged action—its form—is not important: "in enacting Title VII . . . Congress intended to prohibit all practices *in whatever form* which create inequality in employment opportunity due to discrimination." *Franks v. Bowman Transportation. Co., Inc.*, 424 U.S. 747, 763 (1976) (emphasis added).

Despite *Vinson*'s admonition that Title VII "is not limited to 'economic' or 'tangible' discrimination," BNSF argues that the concept of a "tangible employment action," developed in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998),

sets the floor on actionable employer conduct under Title VII. That is wrong. The presence of a tangible employment action, as that term is used in *Ellerth* and *Faragher*, serves only to denote those situations in which an affirmative defense is *not* available to an employer accused of creating a hostile work environment through supervisory harassment. That is, the Court created an affirmative defense precisely for actionable cases of harassment in which a tangible employment action is lacking.

Actionable employer conduct need not be economic or tangible; nor must it inflict serious psychological harm: "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

Since there is no requirement that actionable employer conduct must, in every case, lead to economic, tangible or psychological injury, a plaintiff possesses a viable § 703(a) claim if a reasonable person could conclude that the conduct under scrutiny (1) altered the terms, conditions or privileges of his employment, or (2) deprived or *tended to deprive* him of employment opportunities, or (3) adversely affected his status as an employee in any other way. In short, even were retaliation claims under § 704(a) held exactly to § 703(a)'s actionability standards—and they should not be—those standards are broad indeed.

3. *The conduct challenged here.* The two employer actions about which White complains are each actionable under both § 703(a) and § 704(a). BNSF suspended White without pay for 37 days. Such conduct, if discriminatory (and the jury found it was), quite clearly falls within the plain language of § 703(a)(1), which prohibits an employer from "discriminat[ing] against any individual with respect to his *compensation*" (emphasis added). So even if § 703(a)'s criteria are applied to this § 704(a) action, White will prevail.

In fact, the actionability standard covering § 704(a) should apply, since this case arose under that provision. And here there can be no doubt that a "reasonable worker" might well be "dissuaded" from pursuing an EEO claim if she knew she would be put off the property—without pay—and with no assurance that she would ever get her job back. *See Rochon*, 2006 WL 463116 at *8; *Mitchell*, 361 U.S. at 292 ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.").

BNSF's action in reassigning White's duties was likewise subject to challenge even under the language of § 703(a)(1), as an alteration in the "terms, conditions, or privileges of employment." White operated a forklift before she complained of discrimination. After her complaint, however, her supervisor took her off the forklift and assigned her to physically demanding and dirty train-yard work. Again, the jury found retaliatory animus.

This was not a situation in which White's opposition to the new duties was based on "[m]ere idiosyncrasies of personal preference." *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999). In BNSF's Statement of the Case—but nowhere in its argument—the company concedes that "other employees in the yard believed White had been unfairly assigned *forklift duties* (which are perceived by some as *less physically demanding and cleaner* than other track work)." Brief for Petitioner at 4 (emphasis added).

Since the dawn of Title VII, courts have recognized that the discriminatory assignment of workers to dirtier, more arduous duties violates the Act, *see United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 658 (2d Cir. 1971), and that principle applies here as well. And once again, a "reasonable worker" could easily be "dissuaded" from resorting to "statutory remedial mechanisms," *Robinson*, 519 U.S. at 346,

if he knew he faced reassignment to duties that his co-workers agreed were dirtier and more arduous.

Many other types of allegedly retaliatory conduct by an employer, including lateral transfers, public humiliation, threats of economic harm and poor evaluations, may also be actionable. As always, the question is whether a reasonable person might be dissuaded from complaining about work-place bias (under § 704(a)), or would see the conduct as changing his terms, conditions or privileges of employment, or depriving or tending to deprive him of employment opportunities, or otherwise adversely affecting his status as an employee (under § 703(a)).

BNSF and its *amici* say the sky will fall if this Court affirms the decision below. It won't. In any event, the statutory language is clear, and "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citation omitted). This principle leads to affirmance.

ARGUMENT

I. THE BROAD LANGUAGE OF § 704(a) OF TITLE VII COVERS ALL EMPLOYER CONDUCT THAT MIGHT DISSUADE A REASONABLE WORKER FROM PARTIPATING IN THE EEO PROCESS

We agree with BNSF that the "starting point in any matter of statutory construction is the text of the statute," and that this Court does not "'construe statutory phrases in isolation; we read statutes as a whole.'" Brief for Petitioner at 13, *quoting United States v. Morton*, 467 U.S. 822, 828 (1984).

A. The Statutory Text Is Expansive in Both §§ 703(a) and 704(a), but It Is Broader in § 704(a)

Section 703(a) of Title VII provides:

> (a) *Employer practices.* It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Subsection (a)(1) speaks to discrimination with respect to "compensation, terms, conditions, or privileges of employment." Subsection (a)(2)—which BNSF ignores—is broader, barring any limitation, segregation or classification based on suspect motivation that "deprive[s] or *tend[s] to deprive* any individual of employment opportunities or otherwise adversely affect his status as an employee" (emphasis added).[3]

When subsections (a)(1) and (a)(2) are considered together, "as a whole," *United States v. Morton*, 467 U.S. at 828, it is evident that Congress intended to interdict all manner of

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[3] Subsection (a)(2) provides the foundation for disparate impact analysis, *see, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991 (1988), but it applies to disparate treatment cases (like this one) as well. *See Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 1550-51 (2005) (O'Connor, J., concurring in the judgment) (discussing parallel provision of Age Discrimination in Employment Act).

discriminatory employer actions that affect "terms, conditions, or privileges of employment," that "deprive or tend to deprive" a worker of "employment opportunities," or that "adversely affect his status as an employee" in any other way. This is a sweeping standard, but the one in § 704(a) is even broader because, unlike in § 703(a), the prohibited discrimination is not confined to the sphere of employment:

> (a) *Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.* It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 703(a) forbids employers from "discriminat[ing]" against employees (subsection (1)) or "limit[ing], segregat[ing], or classify[ing]" them (subsection (2)) in terms of various aspects of employment. But § 704(a) simply proscribes "discriminat[ion]," without more, and plainly reaches beyond the employment arena. *See Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S.Ct. 1497, 1505 (2005) ("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave [Title IX of the Education Amendments of 1972] a broad reach.").

B. The Court's Decisions on Statutory Retaliation Stress the Necessity to Protect Workers from Conduct that Might Deter Them from Participating in Remedial Processes

In its construction of § 704(a) and comparable anti-retaliation provisions in other legislation regulating the workplace, the Court has consistently emphasized the need to protect workers from conduct that might deter them from exercising their statutory right to seek a remedy for employer

violations. The Court's most significant decision interpreting § 704(a) itself, *Robinson*, 519 U.S. at 337, held that its protections extended to former employees. In reaching this conclusion, the Court concurred with EEOC's position that excluding ex-employees "would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to *deter* victims of discrimination from complaining to the EEOC." *Id.* at 346 (emphasis added). In particular, the Commission's arguments advanced "a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." *Id.*

In support, the Court cited *National Labor Relations Board v. Scrivener*, 405 U.S. 117 (1972), which arose under the National Labor Relations Act, and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), a case under the Fair Labor Standards Act. *Robinson*, 519 U.S. at 346. In both *Scrivener* and *Mitchell*, the Court saw a broad reading of anti-retaliation provisions as crucial to effective enforcement.

Scrivener interpreted § 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4), which makes it an unlawful labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The employer had terminated an employee who gave a written, sworn statement to an NLRB examiner during an investigation, but he had not filed a charge himself or testified at a formal hearing. The Board held that the firing violated §§ 8(a)(1) and (4) of the Act, but the court of appeals disagreed. This Court granted certiorari and held that § 8(a)(4) had been violated:

> Construing § 8(a)(4) to protect the employee during the investigative stage, as well as in connection with the filing of a formal charge or the giving of formal testimony, comports with the objective of that section. Mr. Justice Black, in no uncertain terms, spelled out the congressional purpose:

> Congress has made it clear that it wishes all persons with information about such practices to be *completely free* from coercion against reporting them to the Board. This is shown by its adoption of § 8(a)(4) which makes it an unfair labor practice for an employer to discriminate against employee because he has filed charges. And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges (citations omitted). *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967).

Scrivener, 405 U.S. at 121-22 (emphasis added) (parallel citations omitted). This "complete freedom is necessary," the Court explained, "'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *Id.* at 122 (citation omitted).

In *Nash*, from which *Scrivener* quoted, the Court considered a Supremacy Clause challenge to a Florida law that disqualified terminated employees from unemployment compensation if the state commission found that their unemployment resulted from an ongoing labor dispute. The state commission had held that Nash's unfair labor practice charge pending before the NLRB meant that she was involved in a labor dispute and was therefore disqualified from receiving unemployment compensation, simply because she had invoked the NLRA's statutory remedial mechanism. *See Nash*, 389 U.S. at 236-37.

In addition to the language from *Nash* quoted in *Scrivener*, the Court in *Nash* held that the Florida law frustrated congressional intent reflected in § 8(a)(4) because it imposed disincentives to making statutorily-authorized complaints:

> Florida has applied its . . . law so that an employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet and receive unem-

> ployment compensation until he finds a new job or (2) he may file an unfair labor practice charge, thus under Florida procedure surrendering his right to unemployment compensation, and risk financial ruin if the litigation is protracted. * * * It appears obvious to us that this financial burden which Florida imposes *will impede resort to the Act and thwart congressional reliance on individual action.*

389 U.S. at 239 (emphasis added).

Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, which was cited in *Robinson*, 519 U.S. at 346, examined the anti-retaliation provision of the FLSA, § 15(a)(3) of the Act, 29 U.S.C. § 215(a)(3), which makes it unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act." *Mitchell* involved a potential conflict between § 15(a)(3) and § 17 of the Act, which arguably barred awards of unpaid wages and liquidated damages where the Secretary of Labor prosecuted a violation of § 15.

The Court held, however, that such a restrictive construction of § 17 would be inconsistent with the purposes of the FLSA. *Id.* at 294-96. In reaching this conclusion, the Court said that Congress "chose to rely on information and complaints received from employees seeking to vindicate [FLSA] rights claimed to have been denied." *Id.* at 292. Effective enforcement of those rights, though, may "only be expected if employees felt free to approach officials with their grievances." *Id.* This will not be true if, for example, "fear of economic retaliation" is present in the workplace. *Id.* For these reasons, "[b]y the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary pursuant to § 17, Congress *sought to foster a climate* in which compliance with the substantive provisions of the Act would be enhanced." *Id.* (emphasis added).

Finally, in *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983), the Court considered whether or when the NLRB could enjoin under § 8(a)(4) a civil suit filed by an employer against an employee. Before holding that "the prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act that may be enjoined by the Board," *id.* at 744, the Court explained the purpose of § 8(a)(4) and the related § 8(a)(1):

> Sections 8(a)(1) and (4) of the Act are broad, remedial provisions that guarantee that employees will be able to enjoy their rights secured by § 7 of the Act—including the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes—without fear of restraint, coercion, discrimination, or interference from their employer. *The Court has liberally construed these laws as prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities.*

Id. at 740 (emphasis added) (footnote omitted). And the Court specifically expressed concern about "the chilling effect" a lawsuit might have "upon an employee's willingness to engage in protected activity." *Id.* at 741.

As is apparent from this review of the Court's treatment of the anti-retaliation provisions of Title VII, the NLRA and the FLSA, the Court places a premium on "[m]aintaining unfettered access to statutory remedial mechanisms," *Robinson*, 519 U.S. at 346, free from coercion, fear of economic reprisal or any form of restraint imposed by the employer on the exercise of statutory rights. As to Title VII, this perspective is congruent with, and flows from, the breadth of § 704(a).

C. Several Appellate Decisions Extend § 704(a) Beyond Job Actions and Agree that § 704(a)'s Standard of Actionability Focuses on Employer Conduct that Might Dissuade a Reasonable Worker from Participating in the Remedial Process

Because there are no textual limits on the type of employer conduct covered by § 704(a), five circuits have held that the provision reaches actions outside the traditional employment context. The most recent of the five is the D.C. Circuit in *Rochon v. Gonzales, supra.*

In *Rochon*, the plaintiff—a Special Agent in the FBI who had successfully sued the agency under Title VII in the past—complained that the Bureau retaliated against him by refusing to investigate credible evidence of death threats directed at him and his wife by a Federal inmate. The district court dismissed the case, reasoning that actions outside the personnel realm are beyond the ken of Title VII, but the D.C. Circuit reversed.

The court noted that it had previously held in *Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C. Cir. 1991), that cancellation of a symposium honoring the plaintiff, which was not a personnel action, was actionable as retaliation under the Age Discrimination in Employment Act, which is in many respects parallel to Title VII. *See Rochon*, 2006 WL 463116 at *5. The court said that extending *Passer*'s rationale to Title VII "accords with the decisions of the four other circuits that do not require that a retaliatory action be employment-related in order to state a claim under Title VII." *Id.* at *6.[4]

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[4] The four circuits are the Seventh in *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 606 (7th Cir. 1999); the Ninth in *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000); the Tenth in *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996); and the Eleventh in *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

The D.C. Circuit also considered this Court's decision in *Robinson*, as well as EEOC's position (reflected in its Compliance Manual) that § 704(a) prohibits "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." *Id.* The court ultimately held that "an alleged act of retaliation by the Government need not be related to the plaintiff's employment in order to state a claim of discrimination under Title VII." *Id.* at *7; *see also Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 745 (7th Cir. 2002) (Posner, J.), *cert. denied*, 540 U.S. 984 (2003) ("We do not mean to suggest . . . that retaliation, to be actionable under Title VII . . . has to involve an adverse employment action. It does not.").

The D.C. Circuit in *Rochon* also laid out the standard for actionability of retaliation claims: "a plaintiff must demonstrate the 'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 2006 WL 463116 at *8 (citations omitted). Finally, the court determined that the conduct alleged—the refusal to investigate a death threat— "meets this threshold of significance. In other words, a reasonable FBI agent well might be dissuaded from engaging in activity protected by Title VII if he knew that doing so would leave him unprotected by the FBI in the face of threats against him or his family." *Id.*

In sum, the expansive language of § 704(a), as well as the Court's interpretation of that language and other statutory bars to retaliation, leads to a standard for actionability focusing on employer conduct that "dissuade[s] a reasonable worker," *id.*, from exercising his rights under "statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. This is not the same as the standard under § 703(a).

II. A CLAIM IS ACTIONABLE UNDER § 703(a) IF A REASONABLE PERSON COULD CONCLUDE THAT THE CHALLENGED EMPLOYER CONDUCT EITHER (1) AFFECTED COMPENSATION OR OTHER TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT, OR (2) DEPRIVED OR TENDED TO DEPRIVE A WORKER OF EMPLOYMENT OPPORTUNITIES, OR (3) ADVERSELY AFFECTED HIS STATUS AS AN EMPLOYEE IN ANY OTHER WAY

A. Section 703(a)'s Standard for Actionability is Clear on the Face of the Statute

The standard for actionability under § 703(a) is embedded in the statute and phrased in the disjunctive, and no shorthand properly captures it. Discriminatory employer conduct is subject to challenge under § 703(a) if it (1) affects compensation or other terms, conditions or privileges of employment, or (2) deprives or *tends to deprive* a worker of employment opportunities, or (3) adversely affects his status as an employee in any other way.

Section 703(a)'s standard of actionability "is not limited to 'economic' or 'tangible' discrimination," because Title VII is intended "to strike at the entire spectrum of disparate treatment of men and women in employment." *Vinson*, 477 U.S. at 64 (citations and some internal quotation marks omitted). The form of the challenged action is not important, since Congress, "in enacting Title VII . . . intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. at 763.

Injuries need not be economic or tangible to be actionable under § 703(a). Nor must they inflict serious psychological harm:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

Harris, 510 U.S. at 22.

Here the types of consequences that concerned the Court—"detract[ing] from employees' job performance, discourag-[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers"—are all things that "tend to deprive an[] individual of employment opportunities" under § 703(a)(2). Such injuries are actionable, even if they do not flow from, in the D.C. Circuit's terminology, "a cognizable type" of personnel action. *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006).

B. *Ellerth* and *Faragher* Do Not Set a Floor on Actionability

BNSF seeks to argue that the concept of a "tangible employment action," developed in *Burlington Industries v. Ellerth*, and *Faragher v. City of Boca Raton*, sets the floor on actionable employer conduct under Title VII. That argument ignores this Court's admonition that Title VII "is not limited to 'economic' or 'tangible' discrimination," *Vinson*, 477 U.S. at 64, and it represents as well a flagrant misreading of *Ellerth* and *Faragher*.

In *Ellerth*, the Court focused on § 219(2) of the Restatement (Second) of Agency (1957), which sets forth criteria for imposing liability on an employer even when employees commit torts outside the scope of employment. The Court

looked especially at subsection (d)—in particular the language imposing vicarious liability when the employee "was aided in accomplishing the tort by the existence of the agency relation"—and held that this standard was satisfied, as a matter of law, where the harassing supervisor engaged in a tangible employment action. *Ellerth*, 524 U.S. at 762-63. Even where there is no tangible employment action, however, the employer is still subject to vicarious liability for harassment by a supervisor, but the employer is permitted to assert an affirmative defense. *Id.* at 765.

Under *Ellerth* and *Faragher*, an employer is *always* subject to vicarious liability for harassment by one of its supervisors. The tangible employment action serves only to distinguish between those situations in which an affirmative defense is—or is not—available. The Court did not use the term to denote the types of employer conduct that are actionable. Indeed, "[a]lthough Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor] . . . *this is not dispositive*." *Ellerth*, 524 U.S. at 766 (emphasis added). Rather, "Burlington is still subject to vicarious liability for [the supervisor's] activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability." *Id.* Finally, *Faragher* itself confirmed that, "although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to 'economic' or 'tangible' discrimination." *Faragher*, 524 U.S. at 786 (citations and some internal quotation marks omitted).[5]

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[5] *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), which applied the principles developed in *Ellerth* and *Faragher* to cases of constructive discharge, does not help BNSF, either. In particular, the affirmative defense fashioned in those cases may only be used in (actionable) situations *lacking* a tangible employment action, so *Suders* held that the "affirmative defense will not be available to the employer . . . if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation."

C. Section 703(a)'s Test of Actionability Will Often, but Not Always, Produce the Same Result as § 704(a)'s Test

Some courts have applied the language of § 703(a) to retaliation claims under § 704(a). For example, the Seventh Circuit said in *McDonnell v. Cisneros*, 84 F.3d at 258, that "[t]he language of 'materially adverse employment action' that some courts employ in retaliation cases is a paraphrase of Title VII's basic prohibition against employment discrimination, found in" § 703(a).

To the extent that the conduct challenged in a retaliation case is employment-related—as it is here—application of § 703(a)'s test may well lead to the same result as § 704(a)'s. In particular, *all* employer conduct that is actionable under § 703(a) will also be subject to challenge under § 704(a). That is, any conduct that a reasonable person could see, for example, as tending to deprive a worker of employment opportunities would likewise be action that would "dissuade[] a reasonable worker" from participating in the EEO process. *Rochon*, 2006 WL 463116 at *8. The converse, however, is not true; *i.e.*, all employer conduct that is actionable under § 704(a) is not necessarily sufficient to state a claim under § 703(a).

III. THE CONDUCT CHALLENGED BY WHITE IS ACTIONABLE UNDER BOTH § 703(a) AND § 704(a)

The conduct about which respondent White complains should be assessed under the actionability standard in § 704(a), since this is a retaliation case. But White also satisfies the standard under § 703(a).

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542 U.S. at 133. As in *Ellerth* and *Faragher*, the use in *Suders* of the concept of a tangible employment action does not set a floor on actionability; it simply indicates the types of constructive discharges to which the affirmative defense does not apply.

A. The Suspension Without Pay is Actionable Under Both §§ 703(a) and 704(a)

BNSF suspended White without pay for 37 days. Assuming the company was motivated by retaliation (and the jury found it was), the unpaid suspension quite clearly falls within the plain language of § 703(a)(1), which prohibits an employer from "discriminat[ing] against any individual with respect to his *compensation*" (emphasis added). By the same token, a "reasonable worker" would be "dissuaded" from pursuing her statutory remedies if she knew that she would immediately be suspended without pay, with no assurance that she would ever get her job back, so § 704(a)'s test is also satisfied.

BNSF argues, though, that the suspension is not actionable because it was "temporary" and "was not the official decision of the company under the terms of the CBA," *citing International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976). Brief for Petitioner at 33, 37. But in *Robbins & Myers*, the Court rejected the argument that a firing did not become "final" (and hence the statute of limitations did not begin to run) until completion of the contractually authorized grievance process. *Id.* at 234-35.

In *Robbins & Myers*, the Court noted that "the parties could conceivably have agreed to a contract under which management's ultimate adoption of a supervisor's *recommendation* would be deemed the relevant statutory 'occurrence,'" but said that had not happened. *Id.* at 234 (emphasis added). Nor did it happen here. This was not a situation in which a supervisor merely *recommended* that White be suspended. Instead, a supervisor actually suspended her. As in *Robbins & Myers*, White "was [suspended without pay] . . . and all parties so understood. She stopped work and ceased receiving pay and benefits." *Id.* at 234.

In addition to back pay, damages are available under Title VII through 42 U.S.C. § 1981a, by virtue of the Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1072, and in fact the jury awarded White $43,250 in compensatory damages. BNSF's argument means that its provision of a partial remedy to White (reinstatement with back pay) bars her from seeking full relief in the form of damages. Any such result is precluded by *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982), which held that an employer's unconditional job offer cut off further accumulation of back pay—but that the employee who accepted such an offer "retain[ed] his rights to an award by the court of back pay accrued prior to the effective date of the offer, and any court-ordered retroactive seniority," and other relief. *Id.* at 238.[6]

Finally, BNSF argues policy, saying that it is essential for employers to have the ability to suspend workers without pay pending investigation. An employer always has the capacity to suspend its workers, however—either with or without pay—as long as it does not act for unlawful reasons. And if an employee's suspension pending investigation is paid, the damages flowing from unlawful action would be minimized, although possibly not eliminated altogether. *See DeLaughter v. United States Postal Service*, 3 F.3d 1522, 1524 (Fed. Cir. 1993) ("There are many benefits, both tangible and intangible, which may accrue to an employee who is actually present and working, instead of being away from the work place while on administrative leave. For example, the employee may gain valuable work experience; he may be eligible for performance awards; he may be assigned overtime duty; or he may benefit psychologically from earning his pay rather than merely receiving it.").

---

[6] Because *Ford Motor Co.* arose before enactment of the Civil Rights Act of 1991, damages were not available.

If BNSF had suspended White with pay, its investigation would likely have been completed in far less than 37 days, and she probably would not have suffered $43,250 in damages. In any event, the deprivation of pay suffered by White is actionable under the precise text of § 703(a)(1), as well as § 704(a).[7]

B. The Reassignment is Actionable Under Both §§ 703(a) and 704(a)

White's reassignment is also subject to challenge under § 703(a)(1)'s language, since the terms, conditions or privileges of her employment were altered. White was operating a forklift before she complained of discrimination. After her complaint, however, her supervisor took her off the forklift and assigned her to the more physically demanding and dirtier train-yard work. The jury found that this decision sprang from retaliatory animus.

Once again, BNSF erroneously relies on *Ellerth*, *Faragher* and *Suders* to argue that White's reassignment was not a tangible employment action. It need not be. Nor was this a situation in which White's objection to the reassignment sprang from "[m]ere idiosyncrasies of personal preference." *Brown*, 199 F.3d at 457.

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[7] BNSF also relies on *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000), which held that a professor who was denied tenure and informed that her appointment would expire, but who then secured tenure (and back pay) following the filing of a grievance, had not suffered an adverse action. The court below distinguished *Dobbs-Weinstein* based in part on "the unique nature of 'tenure decisions in an academic setting'" and did "not decide to what extent [the] holding in *Dobbs-Weinstein* survive[d] [its] decision." *White*, *supra*, 364 F.3d at 802. More to the point, *Dobbs-Weinstein* is fundamentally at odds with *Delaware State College v. Ricks*, 449 U.S. 250 (1980), which held that the running of the statute of limitations for a claim of tenure denial is not affected by the invocation of a grievance process.

BNSF concedes that "other employees in the yard believed . . . forklift duties . . . [were] less physically demanding and cleaner than other track work." Brief for Petitioner at 4. Indeed, the supervisor "informed White that he was removing her from the forklift position and assigning her to a standard track laborer position because of her co-workers' complaints." *White*, *supra*, 364 F.3d at 792-93. Hence there was record evidence—acknowledged by BNSF—that it was not only White who thought that forklift duties were more desirable. The other workers thought so, too, and they even went so far as to complain to management that White had been given this plum assignment.

It is far too late in the day to argue that discriminatory assignment of dirtier, more arduous duties is permissible under Title VII. *See, e.g., United States v. Bethlehem Steel Corp.*, 446 F.2d at 655 ("Job assignment practices were even more reprehensible. Over 80 per cent of black workers were placed in 11 departments, which contained the hotter and dirtier jobs in the plant."). The reality here was that White suffered a change in the terms, conditions or privileges of her employment when she was removed from forklift duties, making the reassignment actionable under § 703(a).

Once again, though, it makes more sense to apply the actionability standard in § 704(a) in this retaliation case. And a "reasonable worker" would easily be "dissuaded" from resorting to "statutory remedial mechanisms," *Robinson*, 519 U.S. at 346, if he knew he faced reassignment to duties that his co-workers everyone agreed were dirtier and more arduous, and therefore less desirable.

C. Other Employer Conduct is Also Actionable

Lateral transfers—those in which title, pay, benefits and duties are supposed to remain the same—may be actionable under § 703(a) if a jury could reasonably find that the transfer entailed a change in the terms, conditions or privileges of employment, a denial or a tendency to deny employment

opportunities, or any other adverse effect on a worker's status as an employee. In a case of retaliation under § 704(a), the transfer would be actionable if it would dissuade a reasonable worker from EEO participation. For example, in a § 703(a) case, the Seventh Circuit in *Collins v. State of Illinois*, 830 F.2d 692 (7th Cir. 1987), noted that "other courts have found adverse job impact, where there was no reduction in salary or benefits, in an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationery and support services." *Id.* at 703 (footnotes omitted). The court commented that:

> Title VII does not limit adverse job action to strictly monetary considerations. One does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture.

Id.

In the end, the *Collins* court held that the plaintiff suffered an actionable injury because, among other things, "[h]er supervisors seemed unsure of what [her] responsibility and authority would be at the newly created job," she was "relegated to doing reference work instead of consulting," and "[s]he did not have her own office" any longer. *Id.* at 704. *Collins* was correctly decided. Not only was there a change in the terms, conditions or privileges of the plaintiff's employment, placement in the new job tended to deprive her of employment opportunities, since her duties were uncertain and she was forced to do more menial work.

Some cases involving lateral transfers, however, are plainly wrong, *e.g.*, *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570, 575 (5th Cir. 2003), *cert. denied sub nom. Hernandez v. Crawford Bldg. Material Co.*, 540 U.S. 817 (2003), in which the court said that "a decision made by an

employer that only limits an employee's opportunities for promotion or lateral transfer does not qualify as an adverse employment action under Title VII." On the contrary, a limitation on "opportunities for promotion" fits squarely with the language of § 703(a)(2), since at a minimum the employer has "limit[ed]" the employee "in a[] way which would . . . tend to deprive [him] of employment opportunities."[8]

In similar fashion, the D.C. Circuit sweeps much too broadly in saying that "[p]urely subjective injuries, such as . . . public humiliation or loss of reputation . . . are not adverse actions." *Forkkio v. Powell*, 306 F.3d 1127, 1130 (D.C. Cir. 2002). It is easy to imagine factual situations in which a jury could reasonably conclude that loss of employment opportunities tended to flow from public humiliation of an employee or damage to his reputation. If so, the claim is actionable under § 703(a) and under § 704(a) as well, because an employee faced with such humiliation for complaining about discrimination would surely be dissuaded from making other complaints in the future.

BNSF is dismissive of an associate in a law firm complaining about writing briefs rather than trying cases, "which might be perceived as advantageous to partnership prospects," Brief for Petitioner at 30, or an employee complaining about being excluded from "regular weekly lunches," *id.* at 46. But if the associate is right about partnership prospects

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[8] The *en banc* court below acknowledged that it was not applying the precise wording of Title VII and had "developed the adverse-employment-action element to prevent the kind of claims based upon trivial employment actions that a strictly literal reading of Title VII's anti-retaliation provision would allow." *White*, *supra*, 364 F.3d at 799. This Court has repeatedly cautioned, however, that the role of courts is to apply clear statutory text as written and not to impose their own policy choices. The Sixth Circuit's extra-textual approach produced the correct result here, but *Banks* illustrates its susceptibility to misuse, and it is preferable to derive actionability standards from the text of §§ 703(a) and 704(a), aided by the Court's decisions.

improving with litigation experience, or if lunches offer an informal opportunity for employees to be visible to upper management, then systematic exclusion from either litigation or lunch at a minimum "tends to deprive" the workers in question of employment opportunities and is actionable under § 703(a)(2). Such exclusion would also dissuade employees from exercising their statutory rights and would be subject to challenge under § 704(a) in a retaliation case. If the plaintiff can establish that the motive is discriminatory—*e.g.*, women are routinely denied the chance to try cases or attend power lunches—or retaliatory, Title VII provides a remedy.

An employer's *threat* to fire an employee for complaining about discrimination may also be actionable. Firing is the workplace equivalent of capital punishment, and in some circumstances a jury might reasonably find that the threat of this guillotine altered the terms, conditions or privileges of employment under § 703(a), or would dissuade a reasonable worker from EEO participation under § 704(a). *See Robinson*, 519 U.S. at 346 (excluding former employees from the protections of § 704(a) "would undermine the effectiveness of Title VII by allowing the *threat* of postemployment retaliation to deter victims of discrimination from complaining to the EEOC") (emphasis added); *see also Mitchell*, 361 U.S. at 292 ("*fear of economic retaliation* might often operate to induce aggrieved employees quietly to accept substandard conditions.") (emphasis added).

In *Brown*, 199 F.3d at 458, the D.C. Circuit rejected the notion that "formal criticism or poor performance evaluations are necessarily adverse actions." But an evaluation is the quintessential "company act"—typically signed by a supervisor (and often by a second-level supervisor or Human Relations official) as part of a formal process. If an evaluation operates to lock an employee into her job, with little hope of advancement, a jury could reasonably conclude that the appraisal tends to deny the worker's employment opportunities under § 703(a), as well as dissuading her from

making complaints of discrimination under § 704(a). Indeed, § 703(a)(2) prohibits employers from discriminatorily "classify[ing]" employees in ways that would tend to injure their employment opportunities, and labeling an outstanding employee as merely "satisfactory" (or worse) in an official company document at a minimum "classifies" the employee in a way that will tend to harm his career prospects.

CONCLUSION

BNSF and its *amici* claim that employers will be placed at a marked disadvantage if the decision below is affirmed. There is no support for that argument, and the statutory text is clear. Given this clarity, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (citation and internal quotation marks omitted).

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been victims of wrongful termination and unlawful employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA's members represent clients under all the statutes set forth in the Statement of Interest.

AARP is a nonprofit, nonpartisan membership organization of more than thirty-six million people age 50 and older that is dedicated to addressing the needs and interest of older Americans in ways that are beneficial and affordable to them and to society as a whole.

One of AARP's primary objectives is to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. Through its advocacy, research, publications, and training programs, AARP seeks to eliminate stereotypes, encourage employers to hire and to retain older workers, and to help older workers overcome obstacles they encounter, including discrimination on the job.

Over half of AARP members are employed, including eighty percent of AARP's membership between ages 50 and 54. All of these members have a strong interest in the outcome of this case, which will affect their rights under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), due to parallels in judicial interpretation of the ADEA, the ADA and Title VII.

Equal Justice Society (EJS) is a west coast based national civil rights organization that gives voice to all those reaching for racial and social justice. Using a three-prong strategy of law and public policy advocacy, cross-disciplinary convenings, and strategic public communications, EJS seeks to restore racial issues to the national consciousness, build effective progressive alliances and create a discourse on the positive role of government. EJS has played a defining role at the state and national levels in the courts, on policy initiatives, and in the public discourse on race. In this role, the organization works to dismantle the structural underpinnings of discrimination by crafting legal strategies and public policies that can withstand long-term challenges for the benefit of all members of our community.

The National Disability Rights Network ("NDRN"), formerly the National Association of Protection and Advocacy Systems ("NAPAS") is the membership association of protection and advocacy ("P&A") agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

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No. 05-259

IN THE

Supreme Court of the United States

Burlington Northern & Santa Fe Railway Co.,
Petitioner,

v.

Sheila White,
Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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ADDITIONAL *AMICI CURIAE*

American Association of University Women
American Civil Liberties Union
Association for Gender Equity Leadership in Education
Association of Trial Lawyers of America
Business and Professional Women/USA
California Women's Law Center
Connecticut Women's Education and Legal Fund
Dads and Daughters
Equal Rights Advocates
Feminist Majority
Legal Aid Society - Employment Law Center
Legal Momentum
Myra Sadker Advocates for Gender Equity
National Alliance for Partnerships in Equity
National Association of Collegiate Women Athletics Administrators
National Association of Women Lawyers
National Council of Jewish Women
National Council of Women's Organizations
National Education Association
National Partnership for Women and Families
National Women's History Project
Northwest Women's Law Center
Pick Up the Pace
United Church of Christ
Women Employed
Women Work! The National Network for Women's Employment
Women's Law Center of Maryland
Women's Law Project
Women's Sports Foundation

QUESTION PRESENTED

Whether an employer is immune from liability for retaliation in violation of Title VII of the Civil Rights Act of 1964 when, in response to an employee's discrimination claim, that employer suspends the employee without pay for more than a month or reassigns the employee to a less desirable position within her employer-defined job description.

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INTEREST OF *AMICUS CURIAE*

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, with special attention given to low-income women and women in non-traditional work environments. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court, the federal courts of appeals, and state courts.[1] NWLC is joined in filing this brief by twenty-nine organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT

Petitioner Burlington Northern concedes that Sheila White, the respondent in this case, was the victim of unlawful sexual harassment by a supervisor. A jury found that after White complained to petitioner and the EEOC about that discrimination, petitioner retaliated by transferring her out of her coveted position as a forklift operator and by attempting to terminate her on false charges of insubordination, resulting in an unpaid suspension of more than a month over the Christmas holidays. Unable to contest the sufficiency of the evidence supporting these factual findings, petitioner asks this Court to hold that such conduct is permissible under Title VII of the Civil Rights Act of 1964, as a matter of law. This Court should reject the invitation. What happened to respondent in this case is emblematic of a continuing widespread problem of sex discrimination against women,

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[1] Letters of consent are on file with the Clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

particularly in non-traditional settings, and of the nearly limitless methods some employers use to punish and deter employees seeking to enforce their Title VII rights.

Section 704 of Title VII, 42 U.S.C. 2000e-3, prohibits any "discrimination against" an employee who alleges a Title VII violation to her employer or to the EEOC, or assists in a Title VII proceeding. The Seventh, Ninth, and D.C. Circuits have properly construed that language to prohibit any retaliation that is likely to deter a reasonable person in the plaintiff's position from engaging in protected activity. This standard is flexible enough to consider the circumstances of each case while also protecting employers and the courts from trivial claims. It is also consistent with the interpretation of similar retaliation provisions adopted by this Court and the courts of appeals in related contexts. Moreover, prohibiting retaliation that would deter a reasonable person from complaining of discrimination is most consistent with this Court's efforts to construe Title VII in a manner that encourages use of internal grievance procedures and voluntary compliance.

Petitioner's contrary construction of Section 704 should be rejected. Petitioner does not contest that it discriminated against respondent because of her protected conduct. But it argues that its conduct was nonetheless lawful because that discrimination did not, in petitioner's view, "affect the terms and conditions of [respondent's] employment," Pet. Br. 8. Petitioner's argument, which seeks to transplant a limitation imposed in a *separate* provision of Title VII (Section 703, the general prohibition against employment discrimination) into the very different soil of the statute's anti-retaliation provision, is doubly flawed.

First, there is no basis for importing into Section 704 a textual limitation Congress imposed only in Section 703. Petitioner is correct that the two terms are related: the purpose of Section 704 is to provide full enforcement of all of Title VII's protections, including those in Section 703. But petitioner's request for a court-approved list of retaliatory

techniques categorically beyond the reach of Section 704 is entirely inconsistent with that goal. As this Court has observed, "it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Second, petitioner loses – and the judgment should be affirmed – even under its own proposed standard. The job transfer and attempted termination with unpaid suspension that occurred in this case both constitute "tangible employment actions" under this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). This Court has already recognized that an "undesirable reassignment" is a tangible employment action. *Ellerth*, 524 U.S. at 764. Moreover, a suspension and threatened termination, even if subject to further management review, come within this Court's definition of a "tangible employment action" because they "fall within the special province of the supervisor" and "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762.

ARGUMENT

I. Introduction

1. Respondent Sheila White was the only woman working in the Maintenance of Way department of a railyard operated by petitioner Burlington Northern & Santa Fe Railway Co. See Pet. App. 3a. It is uncontested that there were no complaints about White's performance of her job duties. It is also uncontested that White was subjected to harassment by coworkers and a supervisor who believed that a railway yard was no place for a woman. *Ibid.* As the jury found, after respondent complained about sex discrimination to her employer and the EEOC, petitioner retaliated against her by transferring her from her position as a forklift operator and by suspending her for more than thirty days without pay

on false charges of insubordination (an action that would have resulted in termination had she not successfully grieved it).

That experience is not uncommon for women attempting to break into traditionally male-dominated fields. Although such jobs pay far more, on average, than positions traditionally filled by women, the rate of sexual harassment is also much higher.[2] Those subject to discrimination – particularly women attempting to fit into a non-traditional work environment – already face substantial pressure to remain silent rather than rock the boat. See, *e.g.*, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 28-29 & nn.24-25 (2005) (collecting social science studies). In far too many cases, moreover, employees have also faced the real risk of retaliation by their employers. For example, one study found that among women complaining of sex discrimination, "over 40% of the respondents cited one or more instances of retaliation." Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983).[3]

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[2] See NATIONAL WOMEN'S LAW CENTER, TOOLS OF THE TRADE 7 (2005) (data show that "while occupations in the male-dominated categories pay an average median hourly wage of $17.69, the traditionally female fields pay just $13.33 on average"); James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 313 (1998) (studies have found that there is a twenty-four percent greater rate of reported incidents of sexual harassment in male-dominated work environments); P. K. Mansfield et al., *The Job Climate for Women in Traditionally Male Blue-Collar Occupations*, 25 SEX ROLES 63, 71 (1991) (finding that sixty percent of women in the trades had been sexually harassed, compared to six percent of women in clerical positions).

[3] See also Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOC. ISSUES 117, 122 (1995) (survey of state employees that found that sixty-

There also is no doubt that such retaliation is effective in suppressing Title VII complaints, and therefore undermines enforcement of the statute. See, *e.g.*, Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Relation Protection: Why Everyone, Including the Employer, Loses*, 5 EMPLOYEE RTS. & EMPLOYEE POL'Y J. 549, 586-87 (2001) (citing studies demonstrating that "nearly 70 percent of female employees questioned about their failure to report sexual harassment in the workplace considered the potential for retaliation to be a moderate or strong influence on their decision").

2. To protect employees from retaliation for complaining about discrimination, Congress enacted Section 704 of Title VII, which provides that it shall be "an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. 2000e-3(a).

In light of the jury verdict below, petitioner does not (and cannot) dispute that it discriminated against respondent by transferring her from her job as a forklift operator to a track laborer position and by falsely accusing her of insubordination and suspending her without pay (with risk of termination) for more than a month. Instead, petitioner argues that respondent's treatment falls within a broadly defined class of retaliatory acts that should be permitted under Title VII.

This view runs afoul of *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997), in which this Court recognized that "a primary purpose" of Section 704 is "[m]aintaining unfettered access to statutory remedial mechanisms." This Court further

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two percent of the respondents stated that they suffered retaliation after reporting harassment).

found that "it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Ibid.* Yet that is precisely what petitioner asks for in this case: permission to retaliate with impunity through broad classes of acts it would have this Court declare outside the scope of Section 704.

Petitioner's interpretation would allow employers to engage in a wide range of conduct that is both openly retaliatory and predictably effective in suppressing legitimate complaints of discrimination as well as discouraging cooperation with government investigations and prosecutions of Title VII claims. For example, under petitioner's view, an employer could suspend every complaining employee without pay for the duration of any EEOC investigation, so long as the employee was eventually reinstated with backpay if the claim was sustained. Indeed, under petitioner's view, an employer would face no Title VII liability for knowingly filing false criminal charges against the employee as punishment for the complaint, because doing so would not be considered to affect a "term or condition" of employment. See, *e.g.*, *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 984 (CA10 1996).

Employers could do all of these things even while making absolutely clear to the entire workforce that these actions were in retribution for the victim's Title VII complaint or EEOC cooperation and that the same would happen to anyone else who failed to learn from the example. Moreover, because petitioner insists that the same rules apply to Section 703 and Section 704, the employer could engage in this conduct expressly on the basis of race, national origin, sex, or religion. Thus, for example, petitioner could have reassigned White from her forklift position on the express ground that "women should not operate heavy machinery."

None of these consequences is consistent with the text, purposes, or prior judicial interpretation of Title VII. And none is required in order to place reasonable limitations on the scope of Section 704.

II. To Fulfill Its Statutory Purpose, Section 704 Should Be Construed To Prohibit Retaliation That Would Deter A Reasonable Employee From Engaging In Protected Conduct.

In this case, petitioner's conduct violated Section 704 under any reasonable construction, as the Sixth Circuit's majority and concurring opinions illustrate. However, the articulation of Section 704 most faithful to the statutory mandate is the "deterrence" standard adopted by the Seventh, Ninth, and D.C. Circuits. Under that standard, Section 704 is not limited to acts of discrimination affecting the employee's "terms, conditions or privileges of employment" as required under Section 703. Instead, Section 704 prohibits any adverse treatment that is "reasonably likely to deter the charging party or others from engaging in protected activity." *Ray* v. *Henderson*, 217 F.3d 1234, 1242-43 (CA9 2000); see also *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116 (CADC Feb. 28, 2006) (same); *Washington* v. *Illinois Dep't of Revenue*, 420 F.3d 658, 662 (CA7 2005) (same); cf. also *Noviello* v. *City of Boston*, 398 F.3d 76, 90 (CA1 2005) (citing deterrence standard with approval). The same interpretation of Section 704 has been advanced by the EEOC, the expert agency charged with the administration of Title VII, in its Compliance Manual. See EEOC COMPLIANCE MANUAL 8-13 (1998), available at *http://www.eeoc.gov/policy/compliance.html*;[4] see also *AMTRAK* v. *Morgan*, 536

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[4] See also EEOC COMPLIANCE MANUAL (CCH) § 491.2 (1975) ("Every instance of unremedied retaliation against persons who engage in Section 704(a) opposition * * * has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination"); EEOC Dec. No. 74-77 (Jan. 18, 1974), 1974 WL 3847, *4 (in considering whether adverse action was encompassed within section 704(a), applying test based on the "clear" purpose behind section 704(a): "to protect employees from being deterred from protesting what they consider to be unlawful employment practices and thereby to preserve the

U.S. 101, 111 (2002) (EEOC interpretations in Compliance Manual "entitled to respect").

A. The Plain Language Of Section 704.

The deterrence standard effectuates the broad language of Section 704, which forbids an employer to "discriminate against" an employee because of protected activity. 42 U.S.C. 2000e-3(a). This Court has recognized that retaliation is "a form of 'discrimination' because the complainant is being subject to differential treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) (construing prohibition against sex discrimination in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a)). "Discrimination" is therefore "a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Ibid.*

B. The Purpose Of Section 704.

The deterrence test is "consisten[t] with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Anti-retaliation provisions are common in the law and this Court has consistently construed such provisions broadly and flexibly to ensure that individuals are not deterred from seeking redress for alleged violations of their federal rights. Both this Court and the United States have observed that the goals of civil rights laws "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1508 (2005) (quoting brief of the United States).[5]

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integrity of the law that Congress enacted to eliminate and remedy such practices where they are found to exist").

[5] See also *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 293 (1960) (noting that an employee's "[r]esort to statutory remedies" will "often take on the character of a calculated risk,"

Retaliation interferes not only with individual rights, but also with the ability of federal agencies to exercise the enforcement powers Congress conferred upon them. Accordingly, this Court has construed retaliation provisions to ensure that neither victims nor witnesses are deterred from complaining to, or cooperating with, federal enforcement agencies like the EEOC. "This complete freedom is necessary," this Court has explained, "to prevent the [Government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972) (citation omitted) (cited by *Robinson*, 519 U.S. at 346). "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (cited by *Robinson*, 519 U.S. at 346).

At the same time, retaliation impedes Congress's larger goal of "encourag[ing] the creation of antiharrassment policies and effective grievance mechanisms" for bringing about voluntary compliance with Title VII. *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764 (1998). Retaliation can deter not only its target, but all other employees from bringing complaints of harassment to the employer's attention.

As discussed next, the deterrence standard is best adapted to serving these purposes, providing comprehensive protection that is tailored to the core concern with retaliation – namely, the objective risk of deterrence – rather than arbitrary proxies that create a "safe harbor" for retaliation.

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with vindication of the employee's federal rights "perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period" or other retaliatory conduct by the employer) (cited in *Robinson*, 519 U.S. at 346).

1. To Fulfill The Statutory Mandate, Section 704 Must Be Flexible Enough To Encompass The Full Range Of Retaliatory Conduct.

As an initial matter, this Court should reject petitioner's request for a list of court-approved retaliation techniques falling categorically outside the prohibitions of Section 704. In *Robinson*, 519 U.S. at 346, this Court specifically warned against construing Section 704 in a way that would permit an employer "to retaliate with impunity against an entire class of acts under Title VII." See also *Hishon* v. *King & Spalding*, 467 U.S. 69, 77 (1984) (rejecting suggestion that "Title VII categorically exempts partnership decisions from scrutiny" because there is "nothing in the statute or the legislative history that would support such a per se exemption").

Eschewing a categorical approach is critical to ensuring that Section 704 performs the function Congress intended. "The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit." *Knox* v. *Indiana*, 93 F.3d 1327, 1334 (CA7 1996). Indeed, the case law illustrates the breadth of retaliatory techniques and the depths to which those intent on punishing complainants will go in order to exact retribution.

Employers may, for example, use ordinary tools of workplace discipline – such as negative performance evaluations, temporary suspensions, shifts in job duties, and official reprimands[6] – to deter discrimination complaints or cooperation with the EEOC. While petitioner calls such punishment "trivial" (Pet. Br. 49), it relies on these modes of discipline to control employee behavior in areas of critical

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[6] See, *e.g.*, *Weeks* v. *New York State Div. of Parole*, 273 F.3d 76, 86 (CA2 2001) (notice of "incompetence" and a "counseling memo"); *Hill* v. *American Gen. Fin., Inc.*, 218 F.3d 639, 645 (CA7 2000) (negative performance reviews); *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 708 (CA5 1997) (reprimands and negative work evaluation, leading to missed opportunity for pay raise).

importance to the enterprise, ranging from workplace safety to the efficiency upon which the very existence of the company depends. Indeed, petitioner argues that temporary suspensions are a critical device for ensuring the safe and efficient operation of its railways. Pet. Br. 39-40. It cannot, in turn, plausibly deny that these methods are also effective when used to deter complaints rather than violations of workplace rules.

It is also "obvious that effective retaliation * * * need not take the form of a job action." *McDonnell* v. *Cisneros*, 84 F.3d 256, 259 (CA7 1996). The case law illustrates a range of retaliation methods that take place outside the workplace, and thus arguably do not affect the "terms and conditions" of employment, yet can be highly effective in deterring employees from asserting Title VII rights or cooperating with enforcement agencies. See, *e.g.*, *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116, at *1 (CADC Feb. 28, 2006) (retaliation against FBI agent "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [plaintiff] and his wife"); *id.* at *7 (noting that under standard protecting against only employment-related retaliation, "the IRS could retaliate against a complaining employee by subjecting him to a tax audit"); *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 984 (CA10 1996) (management caused malicious criminal forgery charges to be filed against former employee who had filed a discrimination complaint); *Richmond-Hopes* v. *City of Cleveland*, No. 97-3595, 1998 WL 808222, at *1 (CA6 Nov. 16, 1998) (per curiam) (supervisor told complainant's male coworkers that "he wouldn't hold it against any of them if 'something happened on the job' to her" and that "payback is a bitch"); *Pereira* v. *Schlage Elecs.*, 902 F. Supp. 1095 (N.D. Cal. 1995) (alleging employer took no action after learning that plaintiff's co-workers had responded to her sex discrimination complaints by threatening to kill her and her family, burn down her house, kidnap her and leave her in a bad neighborhood "so people can rape and kill" her); cf. also

Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883, 894 (1984) (employer retaliated by reporting undocumented employees to INS).

The ways in which employers may attempt to deter and punish those who raise complaints of discrimination are virtually limitless. See, *e.g.*, *Hoffman-Dombrowski* v. *Arlington Int'l Racecourse, Inc.*, 254 F.3d 644, 654 (CA7 2001) (secret videotaping)); *EEOC* v. *Navy Fed. Credit Union*, 424 F.3d 397, 407 (CA4 2005) (increased surveillance); *Diamond* v. *Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 314 (CA4 2005) (monitoring phone calls); *Sullivan-Obst* v. *Powell*, 300 F. Supp. 2d 85, 93 n.1 (D.D.C. 2004) (revealing private medical information).

2. *To Fulfill The Statutory Mandate, Employers' Conduct Must Be Evaluated From The Perspective Of A Reasonable Person In The Plaintiff's Position.*

In addition to eschewing categorical rules, the deterrence test properly takes into account that the efficacy of an act of retaliation often depends on the circumstances of each case. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships * * *." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). Accordingly, this Court has held that, when considering a hostile work environment claim, "the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Id.* at 81 (citation omitted). So, too, under Section 704, the deterrence standard prohibits retaliation that would deter *a reasonable person in the plaintiff's position* from engaging in protected activity, a lesson often lost by courts applying other standards.[7]

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[7] While the test looks to the circumstances of the plaintiff, the inquiry is objective, not subjective. See, *e.g.*, *Rochon*, 2006 WL 463116, at *8 (employing "reasonable person" test). Employers

By contrast, a categorical approach to retaliatory conduct ignores the fact that even seemingly minor retaliation can have a substantial detrimental impact on an employee in particular circumstances. If categorical exemptions were allowed, as petitioner seeks, employers could exploit these exceptions to deter employees from raising complaints of discrimination. Respondent's suspension without pay in this case presents a vivid example. While a month-long suspension without pay might create little hardship (and therefore less risk of deterrence) to corporate executives or law firm partners, petitioner's attempts to minimize the hardship imposed on respondent is seriously out of touch with the reality faced by most working Americans. Losing pay for an uncertain or extended time period imposes great harm on a low- or middle-income worker. Going even a single week without pay is a severe burden for a great many Americans. See, *e.g.*, ACNielsen, "Large Number of U.S. Consumers Continuing to Live Paycheck to Paycheck" (June 13, 2005), available at *http://us.acnielsen.com/news/20050613.shtml* (twenty-eight percent of the workforce lives paycheck to paycheck).

In addition, many workers are vulnerable as a result of family circumstances. As an abstract concept, a "schedule change" might appear to be nothing more than a trivial annoyance. But for two-parent working families, single parents, and working adults with responsibility for the care of dependent relatives, schedule manipulation can be devastating. In *Ray* v. *Henderson*, 217 F.3d 1234, 1239 (CA9 2000), for example, the plaintiff had complained that a supervisor was sexually harassing female employees. In retaliation, the supervisor withdrew permission for the plaintiff to start and end work earlier than his scheduled shift. For many workers, such a change would amount to only a minor inconvenience, lacking any reasonable deterrent

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need not, therefore, fear exposure under Title VII based on the unreasonable responses of an atypical employee.

potential. However, the plaintiff in *Ray* had been given this dispensation in order to allow him to care for his sick wife. *Ibid.* The adjustment in schedule in that particular case, accordingly, imposed (and was intended to impose) a genuine hardship on the plaintiff as punishment for his discrimination complaint.

Likewise, in *Washington* v. *Illinois Dep't of Revenue*, 420 F.3d 658, 662 (CA7 2005), an employer retaliated against a complainant by withdrawing her flex-time schedule. While perhaps seemingly minor in the abstract, the retaliation was exceedingly harmful in this case because the plaintiff needed the flex-time to care for her child with Downs Syndrome. See also *Hoffman-Dombrowski*, 254 F.3d at 648 (CA7 2001) (employer changed complainant's schedule so that she could not drop her children off at daycare); *Scott-Brown* v. *Cohen*, 220 F. Supp. 2d 504, 510-11 (D. Md. 2002), aff'd, 54 Fed Appx. 140 (CA4 2002) (employee denied advanced sick leave for maternity leave, leading to pecuniary loss, in retaliation for complaint); *Randlett* v. *Shalala*, 118 F.3d 857, 859 (CA1 1997) (retaliatory denial of commonly available "hardship transfer" to care for seriously ill father).

These burdens can be especially acute for many women. As the Court observed in *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721, 737 (2003), "two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women" (citation omitted), not to mention that women continue to bear a greater portion of childcare responsibilities in many families. The economic consequences and deterrent effect of such actions can be at least as severe as "failing to promote" the employee or a "reassignment with significantly different responsibilities" – actions petitioner concedes (Pet. Br. 22) fall within the scope of Section 704. See *Randlett*, 118 F.3d at 862 (noting that "the transfer here was doubtless as important as a promotion").

Finally, the individual circumstances of a particular plaintiff are also important because Section 704 protects not

only individuals who complain about discrimination against themselves, but also those who complain about discrimination against others or cooperate with government enforcement agencies. See 42 U.S.C. 2000e-3(a). As Judge Posner has rightly observed, "it presumably takes rather little to deter such altruistic action." *Herrmreiter* v. *Chicago Hous. Auth.*, 315 F.3d 742, 746 (CA7 2002). This Court has acknowledged that if potential defendants "were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of * * * violations might go unremedied as a result." *Jackson*, 125 S. Ct. at 1508. Taking this reality into account is not "arbitrary," Pet. Br. 48-49 n.17, but rather essential to fulfilling Section 704's central function.

C. Courts Have Long Applied Deterrence Tests To Implement Prohibitions Against Retaliation In Related Contexts.

While petitioner asserts that the deterrence standard is "newly minted" and unworkable, Pet. Br. 45, 46-49, this Court and courts of appeals have applied essentially the same standard in related contexts. For example, this Court has construed a nearly identical provision of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*,[8] "as prohibiting a wide variety of employer conduct that is *intended to restrain, or that has the likely effect of restraining*, employees in the exercise of protected activities." *Bill Johnson's Rests.* v. *NLRB*, 461 U.S. 731, 740 (1983) (emphasis added). In the

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[8] Like Title VII, the NLRA prohibits discrimination in "any term or condition of employment," Section 8(a)(3), while separately prohibiting an employer from "discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under this Act." Section 8(a)(4). This Court has "drawn analogies to the NLRA in other Title VII contexts" because "certain sections of Title VII were expressly patterned after the NLRA." *Hishon* v. *King & Spalding*, 467 U.S. 69, 76 n.8 (1984) (collecting cases).

First Amendment context, a majority of courts hold that a public employee's right to be free from retaliation for protected speech is violated if "the alleged retaliatory conduct was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights * * *." *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000) (internal quotes omitted).[9] There is no evidence that these well-established standards in analogous contexts have proven unworkable.

D. The Deterrence Standard Complements This Court's Decisions In *Ellerth* And *Faragher*.

The deterrence standard is also consistent with this Court's decisions seeking to increase voluntary resolution of discrimination complaints through internal grievance procedures.

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court established a limited affirmative defense in hostile work environment sexual harassment cases. An employer may avoid liability by showing that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided." *Ellerth*, 524 U.S. at 764. This Court adopted the defense to "encourage the creation of

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[9] See also *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004); *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (CA4 2000), cert. denied, 531 U.S. 1126 (2001); *Farmer* v. *Cleveland Pub. Power*, 295 F.3d 593, 602 (CA6 2002); *McGill* v. *Bd. of Educ. of Pekin Elementary Sch. Dist. No. 108*, 602 F.2d 774, 780 (CA7 1979); *Coszalter* v. *City of Salem*, 320 F.3d 968, 976 (CA9 2003); *Bass* v. *Richards*, 308 F.3d 1081, 1088 (CA10 2002); *Tao* v. *Freeh*, 27 F.3d 635, 639 (CADC 1994). But see *Breaux* v. *City of Garland*, 205 F.3d 150, 157 (CA5), cert. denied, 531 U.S. 816 (2000); *Jones* v. *Fitzgerald*, 285 F.3d 705, 713 (CA8 2002); *Stavropoulos* v. *Firestone*, 361 F.3d 610, 619 (CA11 2004), cert. denied, 125 S. Ct. 1850 (2005).

antiharassment policies and effective grievance mechanisms." *Ibid.*

The deterrence standard dovetails with the *Faragher/Ellerth* affirmative defense, effectively prohibiting under Section 704 the kind of retaliatory conduct that might foreseeably lead an employee not to use the employer's internal grievance procedure. Adopting petitioner's approach, on the other hand, would make it reasonable for employees to forgo employer grievance systems in many cases. That is, an employee's failure to complain about harassment will not be unreasonable – and therefore the employer will be unable to establish the affirmative defense – when the employee is deterred from complaining by the employer's retaliatory acts against other complainants. Indeed, the narrower the construction of Section 704, the greater the likelihood that employers will not hear of harassment until the employee has filed a charge with the EEOC.

E. Petitioner's Objections To The Deterrence Standard Are Meritless.

Petitioner's objections to the deterrence standard have no merit. They rest either on an ill-founded equation of Sections 704 and 703 or on illusory fears about the consequences of the approach already in effect in the Seventh, Ninth, and D.C. Circuits.

1. Petitioner argues first (Pet. Br. 45) that the deterrence standard conflicts with Congress's putative intent to limit claims under Section 704 to retaliation that takes the form of an "adverse employment action" that alters an employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1). A number of courts have rightly rejected this interpretation. See, *e.g.*, *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116 (CADC Feb. 28, 2006); *Ray* v. *Henderson*, 217 F.3d 1234, 1243 (CA9 2000); *Herrmreiter* v. *Chicago Housing Auth.*, 315 F.3d 742, 746 (CA7 2002); see also *Noviello* v. *City of Boston*, 398 F.3d 76, 90 (CA1 2005); Pet. App. 36a (Clay, J., concurring).

Even though the "terms and conditions" qualifying language appears nowhere in Section 704, petitioner argues that Congress nonetheless intended to include that limitation in Section 704 because Congress expressly included it in a *different* statutory provision, Section 703. Pet. Br. 13-15, 18. But that is precisely the opposite inference that this Court normally draws in such circumstances: "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). See also *O'Gilvie* v. *United States*, 519 U.S. 79, 95 (1996) (finding that this canon is particularly apt when "the contrasting phrases appear in adjoining provisions that address precisely the same subject matter and that even have identical grammatical structure"). Here, as this Court has repeatedly observed, the term "discriminate" has a broad plain meaning that is not limited to any particular form of "intentional unequal treatment." *Jackson*, 125 S. Ct. at 1505. It is obviously for that very reason that Congress understood that a qualification was necessary in Section 703 if *that* provision was to be limited to discrimination affecting only the "terms and conditions" of employment.[10]

Petitioner asserts that Congress could not possibly have intended to provide Section 704 a greater scope than Section 703, because that would mean Congress intended to provide "*less* protection to victims of the most hateful forms of discrimination." Pet. Br. 47. To the contrary, the difference

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[10] Petitioner suggests that the "terms and conditions" qualifier of Section 703 is incorporated into Section 704 by the latter provision's use of the words "employment practice." Pet. Br. 18-19. But if prohibiting an "employment practice" necessarily required proof of an alteration in the "terms and conditions and privileges of employment," there would have been no need for the "terms and conditions" language in Section 703 (which also defines an "unlawful employment practice").

in scope arises because Sections 703 and 704 serve different purposes and implicate a different balance of interests.

The two provisions, while related, ultimately serve distinct functions. The principal harm Congress intended to address in Section 703 is the denial of equal access to employment opportunities. See *McKennon* v. *Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995). In limiting the types of job-related discrimination claims cognizable under Section 703, Congress balanced the interest of employees in equal access to the most important incidents of employment and the employers' interest in limiting exposure to claims of workplace discrimination.

Section 704, on the other hand, addresses different harms and a substantially different balance of interests. The principal harm addressed by Section 704 is interference with Title VII enforcement. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997). When an employer retaliates against an employee who has complained about discrimination, or cooperated with an EEOC investigation, there is a significant public interest at stake as well. For one thing, retaliation often has the effect, very often specifically intended, of deterring not only the direct victim, but also all other employees who observe the retaliation. In addition, conduct such as occurred in this case interferes not only with individual rights, but also with the operations of government enforcement agencies and, as noted above, with the effectiveness of internal grievance processes. Moreover, retaliation substantially reduces the efficacy of *all* of Title VII's prohibitions: even a relatively minor act of retaliation can effectively preclude redress for the most severe forms of discrimination prohibited by Title VII. This very different balance of interests precludes importing the limitations on actions under Section 703 into the text of Section 704.

Petitioner's argument moreover is inconsistent with both the holding and the rationale of this Court's decision in *Robinson*. In that case, this Court held that giving a former employee a negative job reference in retaliation for an EEOC

complaint was actionable under Title VII. 519 U.S. at 345-46. That holding is impossible to square with petitioner's assertion that Section 704 only prohibits employer conduct that adversely affects the terms and conditions of the plaintiff's employment, as the plaintiff in *Robinson* was no longer even employed by the defendant, a point made by the lower court in that case. See *Robinson* v. *EEOC*, 70 F.3d 325, 331 (CA4 1995). Moreover, this Court's reasoning in *Robinson* fatally undermines petitioner's position. To decide whether the negative job reference was actionable, this Court did not look to the terms of Section 703, or ask whether the reference was an "adverse employment action." Instead, the Court looked to the language and purposes of the applicable provision, Section 704 itself. *Id.* at 345-46. That same analysis should be applied in this case.

2. Petitioner is also wrong in asserting (Pet. Br. 46-47) that the deterrence standard is an undue interference with employer prerogatives, and fails to protect employers adequately against meritless or trivial retaliation claims. First, the deterrence standard protects employers by retaining the requirement that the plaintiff must show a causal nexus between the complaint of discrimination and the employer's action. Thus, an employer may take any action it desires against an employee – including a job reassignment or suspension without pay without fear of Section 704 liability – so long as it does so for non-retaliatory reasons. Accordingly, an employer may, with impunity, transfer an employee because of concerns about seniority, or suspend her out of a bona fide concern for safety. What it may not do is to take these actions in order to retaliate against an employee who opposes discrimination under the Act.

Second, the deterrence standard protects employers by proscribing only such retaliation as would deter a reasonable employee in the plaintiff's position from engaging in protected activities. Thus, a retaliatory "dirty look," *Herrnreiter*, 315 F.3d at 744, or "trifling slight" (Pet. Br. 13) would not be actionable. See, *e.g.*, *Brooks* v. *City of San*

Mateo, 229 F.3d 917, 929-30 (CA9 2000) (rejecting retaliation claims as alleging insufficiently adverse employment actions because "only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation"); *Manatt* v. *Bank of America*, 339 F.3d 792, 803 (CA9 2003).

3. Although petitioner complains that the deterrence standard is unworkable (Pet. Br. 48), such "reasonable person" tests are common in the law, including under the hostile work environment analysis that petitioner argues (Pet. Br. 32 n.8) should govern many retaliation claims. See *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (establishing "reasonable person" standard for hostile work environment claims); see also *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 147 (2004) (applying "reasonable person" standard to constructive discharge claim). Indeed, while petitioner complains (Pet. Br. 46-47) that the deterrence standard could be misapplied, it also asserts that the standard *it* supports was misapplied in this very case (and in many others), see *id.* 24. Between the two, the deterrence standard provides courts with much more substantial guidance by focusing on the deterrent potential of the challenged act of retaliation.

4. Finally, there is no evidence to support petitioner's claim that the deterrence standard would lead to a flood of meritless claims. See Pet. App. 43a-44a (Clay, J., concurring). Indeed, the deterrence standard has been in place in the nation's largest and most populous circuit since 2000. *Ray* v. *Henderson*, 217 F.3d 1234 (CA9 2000); Office of the Circuit Executive, *History and Guide to the U.S. Courts* (2005), available at *http://www.ce9.uscourts.gov* (last visited Mar. 3, 2006) (Ninth Circuit handles twenty percent of the nation's litigation and exceeds all other circuits in geographic size, population, and volume of litigation). Yet petitioner has put forward no evidence to suggest that the Ninth Circuit has been overwhelmed by meritless Title VII

retaliation claims since that time.

III. Petitioner's Retaliatory Conduct Violated Section 704 Under Any Reasonable Standard.

Petitioner's protestations to the contrary, there can be little doubt that its conduct in this case, undertaken for the undisputed purpose of punishing respondent for her discrimination complaints, is prohibited by Section 704.

A. Respondent's Retaliatory Suspension Without Pay Was Unlawful.

The jury found, and the Sixth Circuit confirmed, that when respondent complained of discrimination to the EEOC, petitioner responded by suspending her for more than a month not because of any genuine belief that she had engaged in actual insubordination, much less insubordination that posed a risk to public safety, but rather as retaliation for her complaints. Moreover, as the en banc court explained, that suspension "would automatically become a termination if White did not file a grievance with her union appealing the decision within fifteen days." Pet. App. 6a. The Sixth Circuit rightly rejected petitioner's assertion that such action falls outside the protection of Section 704. See, *e.g.*, *Roberts* v. *Roadway Express, Inc.*, 149 F.3d 1098, 1104 (CA10 1998) ("Actions such as suspensions or terminations are by their nature adverse, even if subsequently withdrawn.").

1. As an initial matter, there is no dispute that petitioner's attempted termination and suspension without pay constitutes "discrimination" within the ordinary meaning of the term. Nor can petitioner seriously contend that a thirty-seven-day suspension without pay was so insignificant as to amount to *de minimis* discrimination beyond the purview of Title VII. Indeed, the retaliation caused respondent serious and genuine harm as demonstrated by the jury's award of more than $40,000 in compensatory damages.

Petitioner's detachment from (or disregard for) the reality faced by working Americans is aptly illustrated by its suggestion that respondent "did not have to work and

therefore was free to obtain temporary, substitute employment." Pet. Br. 41. Who would hire someone who had become available for work only because she was on an unpaid suspension for alleged insubordination, especially if she were seeking to be reinstated? Moreover, even if a job search were successful under such trying circumstances, there would inevitably be some period of unemployment before a new job was found and the worker could begin earning any money.

Petitioner's further assertion that the payment of back wages negates any injury suffered during the suspension also misperceives the real world consequences of such retaliation. Respondent explained that being without work and an income for more than a month was particularly difficult because "it was around the holiday":

> That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. And I got very deep – I got very depressed because I didn't have no – I couldn't even have a Christmas dinner, a meal, and so like I said, I had – I was anxious, couldn't sleep at all, and I was just destroyed, I was just upset about the whole thing, no income coming in or anything.

Tr. 154.

Petitioner nonetheless insists that the law turns a blind eye to such injuries, suggesting (Pet. Br. 41) that this Court has held that backpay is an adequate remedy for a discriminatory suspension or dismissal under Title VII. That suggestion is carefully worded for a good reason – the implication is demonstrably false.[11] Congress has specifically

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[11] *Sampson* v. *Murray*, 415 U.S. 61 (1974), held only that a termination allegedly in violation of federal civil service regulations fell "far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." *Id.* at 91-92. But even petitioner does not go so far as to argue that "irreparable injury" is the standard for actionable retaliation under Section 704.

authorized not only backpay for Title VII violations, 42 U.S.C. 2000e-5(g)(1), but also compensatory and punitive damages, *id.* § 1981a(a)(1). That Congress took care to provide a remedy for the injuries respondent suffered in this case is strong evidence that her claim is sufficiently substantial to warrant protection under Section 704.

The harm suffered by respondent is far greater than that caused by many forms of retaliation that even petitioner recognizes are actionable under Section 704. Petitioner cannot seriously contend that being passed over for a modest raise or promotion has more material consequences than being suspended from work for an indefinite period of time without pay while fighting off the prospect of termination.

2. Petitioner also argues that even if the suspension were sufficiently serious, it was not a final action of the employer. Pet. Br. 33-34. In particular, petitioner asserts that the suspension never became a "tangible employment action" under *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), because the suspension was never ratified by upper management through the grievance process. *Ibid.* This argument is meritless as well.

a. First, as explained by the court of appeals, the assertion that a suspension is not an unlawful employment action until ratified through a grievance process is incompatible with this Court's decision in *International Union of Electrical, Radio & Machine Workers, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). In that case, this Court held that an unlawful employment practice occurred when an employee was terminated – defined as when she "stopped work and ceased receiving pay and benefits" – even though that decision was made by a supervisor and was subject to reversal through a grievance process. *Id.* at 234-35. Accordingly, the Sixth Circuit correctly determined that the actionable retaliation in this case occurred when petitioner was suspended, *i.e.*, when she was sent home and stopped receiving her pay. Pet. App. 23a-24a.

There was nothing "tentative," Pet. Br. 37, about that suspension.

b. Second, petitioner's reliance on this Court's decision in *Ellerth* is entirely misplaced. Petitioner's argument confuses the question of whether an act constitutes actionable "discrimination" under Title VII with the distinct question of when liability for a supervisor's creation of hostile work environment is attributable to the employer. The "tangible employment action" concept was adopted by this Court to decide that question of vicarious liability, not to decide whether actionable discrimination had occurred in the first place. 524 U.S. at 754.

In this case, there is no issue of vicarious liability before the Court. Petitioner never argued below that the acts of its supervisors were not properly attributable to the employer. It argued only that respondent's suspension did not constitute actionable retaliation under Section 704. Pet. App. 8a-9a. Had such an argument been available to petitioner, it was waived by the failure to make it below.

Moreover, petitioner cannot plausibly contest that it is vicariously liable for the suspension in any event. What makes such actions attributable to the employer is not their finality, but the fact that the "injury could not have been inflicted absent the agency relation." *Ellerth*, 524 U.S. at 761-62. Nothing in the law of agency or the decisions of this Court makes an employer's displeasure with a supervisor's actions, or a later determination to reverse the supervisor's decision, a defense to vicarious liability for the damages inflicted by the supervisor's conduct in the interim.[12]

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[12] There is no merit to petitioner's suggestion (Pet. Br. 34-37) that a contrary conclusion is compelled by terms of its collective-bargaining agreement with respondent's union. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (Title VII rights may not be waived by the terms of a union contract). Relying on the terms of a collective-bargaining agreement would, in essence, improperly substitute state-law contracting principles for the "federal rule" this Court adopted in *Ellerth*. 524 U.S. at 754-55

Thus, even if *Ellerth* applied, respondent's suspension was a "tangible employment action." Suspensions, like terminations, "fall within the special province of the supervisor" and "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." 524 U.S. at 762. While petitioner stresses that the suspension was subject to further review and consideration (Pet. Br. 34-39), that is not the test under *Ellerth*. To the contrary, nearly every "tangible employment action" identified in *Ellerth* is routinely subject to challenge by aggrieved employees and reconsideration by upper management. See *id.* at 761 (giving examples of "firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). Indeed, the fact that such decisions are subject to further higher-level review is a reason this Court has given for considering them to be "tangible employment actions," not a reason for declining to impute them to the employer. See *id.* at 762 ("A tangible employment decision * * * *may be subject to review by higher level supervisors.*") (emphasis added).

3. Petitioner's claim (Pet. Br. 39) that an exception for suspensions is required by the interest in public safety is also misguided. As the Sixth Circuit explained, when an employer acts out of a concern for public safety – even if that concern is entirely unfounded or misguided – there is no prospect of liability under Section 704. It is only when, as in this case, the employer acts in retaliation and attempts to justify its actions by false pretenses of safety concerns that Section 704 is brought to bear, and properly so.

A "public safety" exception to Section 704 would, moreover, be difficult to confine. Petitioner's rationale would equally support precluding claims of race or sex discrimination on public safety grounds. Moreover, if

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(expressly rejecting the idea that standards for vicarious liability under Title VII should be governed by state law).

working in a railyard bears a sufficient relation to public safety to warrant an exception from Title VII, so must thousands, if not tens of thousands, of other positions throughout the nation. This Court, however, has repeatedly applied Title VII to public-safety-related jobs. See, *e.g.*, *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 134 (2004) (Title VII case involving police department); *Martin* v. *Wilks*, 490 U.S. 755 (1989) (fire department).

"When Congress wanted to grant an employer complete immunity, it expressly did so." *Hishon* v. *King & Spalding*, 467 U.S. 69, 77-78 (1984) (citing, *e.g.*, 42 U.S.C. 2000e(b)(1)-(2)); see also 42 U.S.C. 2000e-2(g) (making exception for certain positions involving national security). Congress's decision not to exempt safety-related employment actions from the scope of Title VII reflects its recognition that nothing in Title VII prohibits an employer from taking any action against an employee for bona-fide safety reasons and its judgment that the cost of having to defend against some ultimately meritless claims is worth the benefit of ensuring workplace equality.

B. Respondent's Involuntary Transfer Was Unlawful.

Petitioner's decision to transfer respondent from her job as a forklift operator in retaliation for her complaints of discrimination also satisfies any reasonable 704 standard. Again, petitioner cannot properly dispute that the transfer constitutes "discrimination" or ignore the jury's conclusion that it was undertaken in order to punish petitioner for her complaints of discrimination. The only question is whether such intentional retaliation is permitted under Title VII.

1. Petitioner argues that respondent suffered no actionable retaliation in this case because she did not suffer "'a *significant* change in employment status' in the form of 'reassignment with *significantly different* responsibilities.'" Pet. Br. 26 (quoting *Ellerth*, 524 U.S. at 761 (emphasis added by petitioner)). Even if that were the correct legal standard, petitioner is simply wrong in asserting that its retaliation

against respondent did not meet it. Petitioner acknowledges that the forklift position was considered a favored position among the employees. Pet. Br. 4. As the court of appeals explained, "[a]ccording to Burlington Northern's own witnesses, the transfer occurred because the forklift operator position was objectively considered a better job and the male employees resented White for occupying it." Pet. App. 25a. Indeed, the pretext offered by petitioner for White's transfer was that other employees were upset that she was allowed to hold this more desirable position "instead of a more senior man." *Id.* 4a (quotes omitted).

To the extent petitioner contests this point, it asks this Court to substitute its view of the evidence for the jury's. That request is particularly inappropriate given this Court's instruction that a claim of discrimination must be considered in light of "all the circumstances" of the case. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Regardless, the jury's conclusion was well supported. As the court of appeals described, the forklift position was not only less arduous and cleaner, but – because it required greater skills and qualifications – also more prestigious. Pet. App. 25a. Indeed, the forklift duties were so different from those required of ordinary track laborers that respondent was the only person among her colleagues qualified to perform them. To replace her, petitioner was required to bring back the employee who had previously held the forklift position. *Id.* 4a.

2. Attempting to extricate itself from the adverse factual findings of the jury, petitioner seeks the protection of a per se rule, arguing that no transfer can ever amount to actionable retaliation under Title VII so long as the employee maintains the same pay and employer-designated job title. Pet. Br. 25-26. Such a per se rule is completely contrary to this Court's approach in Title VII cases of considering "all of the circumstances." *Oncale*, 523 U.S. at 81. Moreover, this Court has gone so far as to say that an "undesirable reassignment" may not only constitute a violation of Title

VII, but constitutes the type of decision that automatically establishes employer liability even when the discriminatory decision is undertaken by a low-level supervisor. *Ellerth*, 524 U.S. at 764; see also *id.* at 761 (same for a "reassignment with significantly different responsibilities"). Accordingly, in *Suders*, this Court gave an example of actionable retaliation by citing to the decision in *Robinson* v. *Sappington*, 351 F.3d 317 (CA7 2003), a case involving a transfer within the plaintiff's job description and without any change in pay, benefits, or title. See 542 U.S. at 140.

Adopting petitioner's proposed "job description" rule would lead to untenable disparities in treatment under Title VII depending on how broadly an employer chose to define its job classifications. According to petitioner, similarly situated employees faced with the exact same discriminatory conduct should be treated differently under Title VII depending on how their employer writes their job descriptions. That simply cannot be the law.

* * * * *

Petitioner inflicted substantial harm on respondent in an attempt to punish her for her complaints of discrimination to management and the EEOC. There is no question that if this Court holds such conduct permissible under Title VII, other employees at Burlington Northern will be understandably reluctant to complain of Title VII violations in the future or to cooperate with EEOC investigations. The enforcement scheme Congress established under Title VII cannot function in such an environment, which is why Congress enacted Section 704 using such broad, unqualified language. While there may be cases in which employees unreasonably allege retaliation arising from trivial employer conduct, this case is not one of them. Moreover, it is not necessary to establish broad categories of permissible methods of retaliation in order to avoid unfairly subjecting employers to unwarranted litigation. Adequate protection for employers can be found in the deterrence standard already applied by this Court under the NLRA, by three circuits under Title VII, and by many

circuits in the First Amendment context. Under that standard – or indeed, under *any* reasonable interpretation of Section 704 – petitioner's retaliatory conduct violated Title VII.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF AMICI CURIAE

Founded in 1881, the *American Association of University Women* (AAUW), an organization of over 100,000 members, has been a catalyst for the advancement of women and a leader in their transformations of American society. In more than 1,300 communities across the country, AAUW branches work to promote education and equity for all women and girls, lifelong learning, and positive societal change. For more than a century, AAUW has activated its advocates nationwide on its priority issues, including: gender equity in education; reproductive rights; economic security; and workplace fairness and civil rights issues. AAUW has long been an advocate of equal opportunity in the workplace, and strongly believes that protection from retaliation is a central component for the fair and effective enforcement of any civil rights law.

The *American Civil Liberties Union* (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Women's Rights Project (WRP) has been a leader in the efforts to eliminate barriers to women's full equality in American society. As part of that work, the ACLU WRP has dedicated vigorous efforts to opening doors to nontraditional work for women and to ensuring women's equal treatment in the workplace. The ACLU has appeared before this Court in numerous cases involving the proper interpretation of civil rights laws and has fought to ensure that all individuals, regardless of race, gender, or other protected characteristics, have equal opportunities in the workplace. The interpretation of Title VII's prohibition on retaliation is a matter of significant concern to the ACLU, because protection from retaliation is key to realizing Title VII's guarantees of equal opportunity and equal treatment.

The *Association for Gender Equity Leadership in Education* (AGELE) is a national organization that works to assure gender equity in education, with a major focus on preparing students for optimal career opportunities in workplaces that are free from discrimination. AGELE supports the amicus brief in *Burlington Northern Santa Fe Railway Co.* v. *Sheila White* because of the implications of the case in weakening protections for employees who claim discrimination and in potentially making it more difficult for complainants to prove discrimination.

The *Association of Trial Lawyers of America* (ATLA) is a voluntary national bar association of approximately 50,000 attorneys who practice in every state and who primarily represent plaintiffs in civil rights and employment discrimination cases as well as personal injury actions.

Business and Professional Women/USA (BPW/USA) is a nonprofit membership organization comprised of working women in 1,300 local organizations around the country. Founded in 1919 by suffragettes, BPW/USA's mission is to achieve equity for all women in the workplace through advocacy, education and information. BPW/USA's National Legislative Platform focuses on workplace equity and work-life balance issues that assist working women fulfill both their work and family responsibilities.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination, Women's Health, Race and Gender, Women's Economic Security, Exploitation of Women and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Burlington Northern Santa Fe Railway Co* v. *Sheila White* case raises questions within the expertise and concern of the California Women's Law Center.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces, and in their private lives. Since 1973, CWEALF has provided legal education and advocacy and conducted public policy work to ensure the enforcement of Title VII. CWEALF seeks to join this brief as *amicus curiae* because we are concerned about the weakening of protections for workers who file complaints of discrimination under Title VII.

Dads and Daughters (DADs) is a national advocacy nonprofit organization for fathers and daughters. DADs works to make the world better, safer, and fairer for all daughters. This includes encouraging girls to pursue all employment options, including those in non-traditional occupations.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA has litigated gender-based discrimination cases before this Court and the courts of appeals. It has also appeared as *amicus curiae* before this Court in Title VII cases, as well as in employment discrimination cases before the California Supreme Court. ERA believes that the full participation of women and minorities in the workforce requires vigorous enforcement of anti-discrimination laws and protection for workers who complain about discrimination.

Founded in 1987, the *Feminist Majority Foundation* (FMF) is a nationwide, nonprofit feminist research and action organization dedicated to advancing women's social, political, and economic equality. Our programs focus on advancing equality for women in all sectors of society as well as recruiting, training, and empowering young women leaders. Our work has supported the development, expansion

and enforcement of protections against all forms of sex discrimination in employment, including broad protections against sexual harassment and protections against retaliation. As a part of our ongoing commitment to advancing economic equality for women, FMF's programs seek to empower women in women in law and law enforcement, business, medicine, academia, sports, and technology.

The *Legal Aid Society – Employment Law Center* (LAS-ELC) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor, and specializes in, among other areas of the law, sex discrimination and sexual harassment. The LAS-ELC has appeared in discrimination cases on numerous occasions before this Court both as counsel for plaintiffs and in an *amicus curiae* capacity.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote recruitment and retention of women in non-traditional jobs. Legal Momentum has litigated cases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area. Legal Momentum is deeply concerned with assuring the most expansive protection from retaliation for women who invoke their rights under anti-discrimination laws. Women in non-traditional jobs, like the respondent in this case, are especially vulnerable to a broad range of retaliatory conduct that can deter complaints about discrimination and harassment.

Myra Sadker Advocates (MSA) is a non-profit organization dedicated to promoting equity in and beyond schools. By working to eliminate gender bias, MSA enhances the academic, psychological, economic and physical potential of America's children. MSA is committed to strengthening laws again gender discrimination and harassment, ensuring that today's girls grow up to join work places that are free from bias and discrimination.

The *National Alliance for Partnerships in Equity* (NAPE) is a consortium of state and local agencies, corporations, and national organizations that collaborate to create equitable and diverse classrooms and workplaces where there are no barriers to opportunities. NAPE, the organization protecting the equity interests of 1,097,782 women and girls enrolled in classes that may lead to nontraditional employment, has a strong interest in assisting the courts and policymakers in striking the appropriate balance between private action and the public interest. The case at hand calls on this Court to address the proper standard for determining what constitutes retaliation that violates Title VII, a doctrine of critical interest to women considering employment in nontraditional occupations. NAPE believes it may have a perspective to share that is not represented by the parties to this appeal, neither of whom directly represents the interests of women in the pipeline to nontraditional careers.

The *National Association of Collegiate Women Athletics Administrators* (NACWAA), founded in 1979, is a non-profit organization dedicated to providing educational programs, professional and personal development opportunities, information exchange, and support services to enhance college athletics and to promote the growth, leadership, and success of women as athletics administrators, professional staff, coaches, and student-athletes. NACWAA is committed to promoting work places that provide equal opportunity for all and are free from discrimination.

The *National Association of Women Lawyers* (NAWL), headquartered in Chicago, is more than 100 years old. It was

the first and is the oldest women's bar association in the United States. Its members consist of individuals as well as professional associations. Part of NAWL's mission is to promote the welfare of women, children, and families in all aspects of society. Among NAWL's interests are economic justice, reproductive rights, and equal protection. NAWL supports equality for women and girls so that they may achieve their full potential. Given its interest in issues affecting women and families as a class, NAWL has participated as an *amicus curiae* in many courts of the United States, including the United States Supreme Court.

The *National Council of Jewish Women, Inc.* (NCJW) is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide. As such we endorse and resolve to work for "the elimination of and protection from, all forms of harassment." Our resolutions also state "equal rights and equal opportunities for women must be guaranteed." Consistent with our priorities and resolutions, NCJW joins this brief.

The *National Council of Women's Organizations* (NCWO) is a nonpartisan, nonprofit umbrella organization of over 200 groups that collectively represent more than ten million women across the United States. As the only national coalition of its kind, NCWO works to promote women's equity in the workplace and in particular to address the difficulties that women face in non-traditional employment. Because traditionally male occupations pay significantly more money than traditionally female occupations, the entry of more women into traditionally male occupations is a way of reducing the disparity in earnings between men and women and therefore is a worthy goal for a country committed to equal opportunity for all. Because there will always be resistance to this kind of cultural change, NCWO supports

effective protections against retaliation aimed at women who choose to work in traditionally male occupations.

The *National Education Association* (NEA) is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to opposing employment discrimination, including retaliation for complaining about sexual harassment, and firmly supports the vigorous enforcement of Title VII.

The *National Women's History Project* (NWHP) is an educational nonprofit organization, founded in 1980 and located in Santa Rosa, California. NWHP's mission is to recognize and celebrate the diverse and historic accomplishments of women by providing information and educational materials and programs. Since our inception, we have supported full employment opportunities for women and the elimination of discriminatory barriers that hamper women's advancement in the workplace. A broad and effective interpretation of Title VII of the Civil Rights Act of 1964 is essential to protect women's employment opportunities.

The *National Partnership for Women & Families* ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and for their families. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The *Northwest Women's Law Center* (NWWLC), based in Seattle, Washington, is a non-profit public interest legal organization that works to advance the legal rights of women through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its

founding in 1978, the Law Center has been dedicated to ending sex discrimination in the workplace. The Law Center has a long history of litigation and *amicus curiae* participation in cases throughout the country on behalf of individuals seeking remedies for unlawful sex discrimination in the workplace, in educational institutions and elsewhere.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace through research and writing, technical assistance, policy advocacy, and public education. Established in 2005 as the successor to Equal Rights Advocates' Higher Education Legal Advocacy Project, the organization files amicus briefs in cases raising issues affecting women's ability to succeed in the workplace, with special emphasis on glass ceiling discrimination, gender stereotyping, and work/family conflict.

The *United Church of Christ* (UCC), with 1.2 million members throughout the United States and Puerto Rico, has long supported the full inclusion and equal treatment of women in the workplace. We were the first to ordain a woman to the Christian ministry when Antoinette Brown was ordained by a Congregational church in Butler, New York, in 1853. Over the decades, our members have advocated for women's role in society and church as equal to that of men. The UCC has supported legislation and public policy calling for equal pay for equal work, equal access to all jobs for which women qualify whether they were "traditional" jobs for women or not. We have a long history calling for non-discrimination in employment, in inheritance law, in education, and in public office as well as within our own denomination. We supported Title VII when it was proposed and worked for its passage. The UCC believes that all workers regardless of gender, age, nationality, race, sexual orientation or ethnicity should receive equal and dignified treatment at the workplace, and should be accorded full due process.

Women Employed is a national membership association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace, and that being retaliated against for complaining about it is like being victimized a second time.

Women Work! The National Network for Women's Employment (Women Work!) is a nonprofit, nonpartisan organization that advocates for women's economic security through policies, programs and partnerships. Since 1978, the Network has assisted more than 10 million women to successfully enter, re-enter and advance in the workforce. Women Work! seeks to advance women's opportunities to pursue nontraditional jobs. For women to succeed in these male-dominated fields, employers must ensure their workplace is free of harassment, discrimination, intimidation, and retaliation.

The *Women's Law Center of Maryland, Inc.* (Women's Law Center) is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, workplace issues, and family law. The Women's Law Center seeks to protect women from discrimination in employment and from retaliatory actions against those who complain, such as the retaliatory actions taken by Burlington Northern against Ms. White.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through

litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

The *Women's Sports Foundation* is a 501(c)(3) nonprofit educational organization dedicated to ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports. Specifically, in our 28 years of experience assisting coaches of women's teams and female athletes and their parents in dealing with Title IX situations, we seldom encounter a case in which those who raise Title IX concerns do not encounter retaliation. Without strong enforcement of such a prohibition, there will be many parents and coaches who will not stand up for the rights of their daughters and players respectively because they fear that their daughters will be hurt or the coach's employment terminated.

(21)

Supreme Court, U.S.
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No. 05-259

In the
Supreme Court of the United States

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

SHEILA WHITE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.3(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner. Petitioner has filed a general consent to the filing of amicus briefs in this case. Respondent has not responded to Pacific Legal Foundation's request for consent.[1]

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. PLF actively engages in research and litigation nationwide over a broad spectrum of public interest issues. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation has created its Free Enterprise Project. The Project seeks to protect the free enterprise system from abusive regulation, a civil justice system that grants excessive liability awards, and barriers to the freedom of contract. Because of its history and expertise with regard to civil rights litigation and economic freedom, PLF believes its perspective will aid this Court in considering this case.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

For all the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: January, 2006.

Respectfully submitted,

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QUESTION PRESENTED

Whether an employer may be held liable for retaliatory discrimination under Title VII for any "materially adverse change in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "ultimate employment decision" (as two other courts of appeals hold).

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INTRODUCTION AND SUMMARY OF ARGUMENT

Claiming insubordination, Sheila White's immediate supervisor immediately suspended her without pay. As part of the collective bargaining agreement with the union that represents White, she was permitted to file a grievance alleging that the suspension was unwarranted. White employed this procedure and, after investigation, White's employer, Burlington Northern and Santa Fe Railway Company, concluded that White should not have been suspended. White was reinstated to her job and received backpay. In White's subsequent lawsuit brought pursuant to Title VII, she alleged that the suspension was an "adverse employment action" in retaliation for her earlier claim of discrimination.

Whichever language this Court adopts to define "adverse employment action," it should not include temporary, interim decisions subsequently corrected by the employer when the employee is made whole through the standard remedies of reinstatement and backpay.[2] Supervisors must have the ability to remove an insubordinate employee from duty pending an investigation. Where, as here, the employee had full access to an internal grievance process and that process results in reinstatement and backpay—corrective action by the employer that makes the employee whole—the Court should find that the temporary inconvenience of the waiting through the investigative process does not rise to the level of an adverse employment action sufficient to sustain a retaliation cause of action.

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[2] Amicus does not address White's claims about the changes in her job duties.

ARGUMENT

I

A TEMPORARY SUSPENSION, FOLLOWED BY REINSTATEMENT AND BACKPAY, IS NOT AN ADVERSE EMPLOYMENT ACTION

A. Suspension Is an Employer's Appropriate Response to an Employee's Perceived Insubordination

Insubordination is a serious offense. Black's Law Dictionary defines it as

> 1. A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. 2. An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give.

Black's Law Dictionary (8th ed., 2004). "There is no more elementary cause for discharge of an employee than disloyalty to his employer." *NRLB v. Local Union No. 1229, Intern. Broth. of Elec. Workers*, 346 U.S. 464, 472 (1953). "An employer is likely to treat insubordination more harshly than most other forms of employee misconduct, . . . because of the threat to workplace discipline." *Bean v. Wisconsin Bell, Inc.*, 366 F.3d 451, 453 (7th Cir. 2004).

At a minimum, insubordination generally provides just cause for immediate suspension. *See, e.g., Town of Dedham v. Civil Service Com'n*, 21 Mass. App. Ct. 904, 907, 483 N.E.2d 836, 838 (Mass. App. 1985) (approving 18-month suspension for insubordination); *Procida v. Grinker*, 154 A.D.2d 290, 291 546 N.Y.S.2d 367 (N.Y.A.D. 1 Dept. 1989) (affirming 80-day suspension for insubordination); *Brennan v. Department of Health and Human Services*, 787 F.2d 1559, 1563-64 (Fed. Cir.

1986) (60-day suspension for insubordination). Insubordination takes on even greater significance when there are safety concerns, as is obvious in the maintenance of a railroad track. *Cf., Kelliher v. Veneman*, 313 F.3d 1270, 1277 n.9 (11th Cir. 2002) (United States Department of Agriculture food inspector's termination for insubordination was reasonable, and not a violation of the Whistleblower Protection Act and not retaliation, where the employee's neglect of duty specifications went to heart of USDA's mission to ensure that unwholesome food products do not enter the marketplace). A supervisor who perceives an employee to be insubordinate must have the ability to remove that person from duty.

If an employer perceives insubordinate behavior, the employer need not wait to be 100% certain of the employee's failure before taking steps to remove the danger from the operation. *See, e.g., Connick v. Myers*, 461 U.S. 138, 151-52 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."). No public policy suggests that employee-litigants are entitled to preferential treatment in this regard.

B. An Internal Grievance Procedure Is the Best Mechanism for an Employee to Challenge a Suspension

This Court previously recognized the value of internal grievance procedures. Under *Faragher v. City of Boca Raton*, 524 U.S. 775, 763 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 807 (1998), an employee's claim fails if she does not make reasonable use of the employer's grievance procedures. Utilizing these procedures rather than proceeding directly to court is consistent with the legislative requirement that complainants seek permission from the EEOC to sue. *See Martini v. Federal National Mortgage Association*, 178 F.3d 1336, 1338 (D.C. Cir. 1999) (remanding to district court with

instructions to dismiss plaintiff's suit as untimely because "Title VII requires complainants to wait 180 days before suing in federal court so that the commission may informally resolve as many charges as possible."), *cited in Taylor v. Small*, 350 F.3d 1286, 1294 (D.C. Cir. 2003). Thus, both Congress and the courts recognize the value of informal resolution and contemplate delays in resolution far beyond the 37 days of White's interim suspension that ultimately was resolved in her favor.

The approval shown to a company's internal grievance procedures is analogous in purpose to the judicial doctrine requiring exhaustion of administrative remedies.

> The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.

McCarthy v. Madigan, 503 U.S. 140, 145 (1992). Exhaustion serves another purpose as well: it promotes judicial efficiency. "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *Id.*

C. Reinstatement with Backpay Is the Standard Remedy for an Unwarranted Suspension

What if White had, in fact, been insubordinate? Immediate suspension without pay is the standard employer response and an appropriate one. If she *had* been insubordinate, the internal grievance procedure would have revealed as much and White would have been terminated, with no entitlement to her pay during the time of her suspension. Because it would be, as both a practical and legal matter, impossible to recover wages paid during a suspension, statutes and courts authorize

backpay as the alternative to an employee continuing to receive wages during a suspension.

"The guiding principle underlying the award of backpay is that [employees] must be made whole for the losses that they have suffered by reason of the employer's unfair labor practice." *Cont'l Ins. Co.*, 289 N.L.R.B. 579, 583 (1988). An award of backpay is intended to make whole the victim of discrimination. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). A backpay order is a means to "restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination.' " *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 798 (4th Cir. 1998) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)); *Anecco Inc. v. NLRB*, 285 F.3d 326, 329 (4th Cir. 2002) (backpay serves as a "compensatory, make-whole remedy"). Thus, backpay is classified as restitution, *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995), and there is a strong presumption in favor of backpay awards to victims of employment discrimination. *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). Backpay is an appropriate remedy both for a sexual harassment discrimination claim and for a retaliation claim. *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 873-74 (7th Cir. 1995); *General Teamsters Local No. 162 v. NLRB*, 782 F.2d 839, 844 (9th Cir. 1986) (reinstatement and backpay are conventional remedies under the Act); *see also* 42 U.S.C. § 2000e-5(g).

White's 37-day suspension for insubordination pending an investigation into the matter represented an employer's internal procedures working precisely as they were intended. White did not suffer for having pursued the procedures—she prevailed. Once the suspension was found to be unwarranted, White was eligible for and did receive the standard remedies to make her whole. The five-week wait until the matter concluded is too narrow a pedestal to bear the weight of a retaliation claim.

II

PUBLIC POLICY FAVORS A NARROWER DEFINITION OF "ADVERSE EMPLOYMENT ACTION" FOR RETALIATION CLAIMS

It is not difficult for a duplicitous employee to "set up" an employer for a retaliation claim.[3] An employee can make an unfounded complaint that her employer discriminated against her. Perhaps especially because the complaint *was* unfounded, the employer reacts emotionally or angrily. The employee now has a legitimate claim for retaliation because there is no requirement that a plaintiff prevail on an underlying discrimination claim to win the day on a retaliation cause of action. Wendy Hyland, *Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims*, 90 Ky. L. J. 273, 276-77 (2002); Douglas E. Ray, *Title VII Retaliation Cases: Creating a New-Protected Class*, 58 U. Pitt. L. Rev. 405, 407 (1997) ("because an employee challenging employment practices under Title VII can be protected whether or not the opposed practices actually violate Title VII, retaliation cases substantially expand Title VII coverage. Moreover, coverage has been extended by cases protecting former employees from retaliation months and even years after separation.").

The more broadly defined the adverse employment action is, the easier it is for a disgruntled employee to leverage an

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[3] Not all employers are evil; not all employees are virtuous. And vice versa. It is an unfortunate fact that individuals who find themselves in an adversarial stance with colleagues may make unfounded claims. *See, e.g., Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980) (In response to a plaintiff who "decided that the best defense to correction from the supervisor was a strong offense," "Section 704(a) is similarly unavailable to protect an employee who makes unfounded claims of discrimination in order to excuse non-compliance with legitimate employer demands.").

unmeritorious initial claim into a successful collateral claim. This is particularly so where the juries tend to sympathize with employees more than employers under most all circumstances.

While employees do need some protection from unfair treatment as a result of a bona fide objection to employer policies, recognizing any subsequent conduct as potentially retaliatory invades the province of the employer/employee relationship. *See* Stephanie Armour & Barbara Hansen, *Flood of 'Retaliation' Cases Surfacing in U.S. Workplace*, USA Today, Feb. 10, 1999, at 1A. Making employers subject to a section 704(a) suit for any action that an employee may find unfair is an undue burden on employers by forcing them to police their every action once an employee has opposed one of its policies or has filed a complaint with the EEOC. Vicky Ramsey Conwell, *Bosses' Retaliation Bringing Lawsuits*, Atlanta J. & Const., Aug. 1, 1999, at 1R. Allowing employers to develop their own policies and procedures to govern relationships with employees following an objection to discriminatory behavior encourages amicable relations pending the proceeding. At the same time, the courts are available if the employer should engage in behavior beyond the scope of its policy. Hyland, *Equal Opportunity for Employers*, 90 Ky. L. J. at 286.

The greater the gulf between a valid cause of action under Section 703 (discrimination) and Section 704 (retaliation), the more incentive exists to encourage unhappy employees to allege a discrimination claim as a means of setting up a much more broadly defined retaliation claim. There should be closer parity between the two sections to reduce the risk of litigious gamesmanship. Thus, this Court should reject the EEOC and Ninth Circuit calls for an extremely broad definition of "adverse employment action" as anything that might "deter protected activity," even when the employee cannot point to any tangible economic impact of the employer's alleged retaliation.

From the perspective of an employee, who already feels vulnerable having filed a complaint, virtually any negative feedback may be perceived as related to the protected complaint. *Id.* at 290-91. For example, in *Tran v. Trustees of the State Colleges in Colorado*, 355 F.3d 1263 (10th Cir. 2004), an employee (Ms. Tran) made a claim of sexual harassment. In response, the employer increased the amount of supervision over the employee. The employee complained that she was being too closely supervised such that her working conditions had become intolerable. But the court found that

> In light of Ms. Tran's prior complaints that other employees were sexually harassing her or engaging in other inappropriate behavior, as well as her prior complaint that Ms. Hanna did not pay enough attention to her during the period when Ms. Hanna was her supervisor, it was reasonable to expect closer monitoring by Ms. Doyle to ensure that Ms. Tran received adequate supervision and was not subjected to inappropriate behavior by other employees.

Id. at 1271. Nonetheless, Ms. Tran did not view Ms. Doyle's actions in this light, felt distressed by the situation, and cited the close supervision as a reason for leaving her employment and filing a claim of constructive discharge. *Id.*

The very broad standard adopted by the EEOC and Ninth Circuit demands that, as a practical matter, courts will be required to intrude into day-to-day management decisions in a way that usually has been condemned by this Court and other lower courts. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978), where this Court explicitly admonished the courts against becoming personnel managers and warned of "the dangers of embarking on a course . . . where the court requires businesses to adopt what it perceives to be the 'best' " employment practices.; *see also Bienkowski v. Am. Airlines,*

Inc., 851 F.2d 1503, 1507-08 (5th Cir. 1988) (holding that "[employment discrimination laws were] not intended to be a vehicle for judicial second-guessing of employment decisions, nor . . . to transform the courts into personnel managers"); *Dale v. Chic. Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986) (stating that the court "does not sit as a super-personnel department that reexamines an entity's business decisions"); *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982) (explaining that employment discrimination laws do "not authorize the courts to judge the wisdom of a corporation's business decisions"); Cathy Currie, *Note, Staying on the Straighter and Narrower: A Criticism of the Court's Definition of Adverse Employment Action Under the Retaliation Provision of Title VII:* Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000), 42 S. Tex. L. Rev. 1323, 1344 (2002).

> A spectrum this broad is grossly unfair to employers who must handle internal office politics and have a reasonable opportunity to protect their interests from a disgruntled employee. The consequence of such a wide array of potential liability hinders the ability of employers to effectively manage employees, inciting fear of retaliation if a manager gives a poor evaluation to an employee. In addition, employees receive a halo of protection after they have complained about alleged unlawful discrimination that may be unjustified, particularly since liability for these alleged practices has yet to be established.

Hyland, *Equal Opportunity for Employers*, 90 Ky. L. J. at 291. Moreover, as retaliation claims are brought in increasing numbers as permitted by an expansive definition of "adverse employment action," there is a risk that serious claims might be buried among the trivial. Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses?—Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?*, 14 Lab. Law. 373, 410 (1998).

On the other hand, if the employee is not trying to set up the employer, and is genuinely distressed by perceived discrimination and wants to work to rectify it within the workplace, reconciliation between employer and employee is more likely to occur if the matter is resolved in more informal proceedings. "Courts have emphasized that Congress intended to encourage employers and employees to conciliate rather than litigate their grievances involving discrimination within the workplace." Ann M. Henry, *Comment, Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 U. Chi. Legal F. 553, 568 (1999). Once the employment relationship becomes fodder for litigation, with dueling discovery, supervisors and coworkers reluctantly deposed, and all the adversarial trappings of the judicial system, both sides are likely to incur high costs in money and acrimony. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1031-32 (1991) ("[a] souring of the employment relationship[] militates against litigation . . . . In most cases, litigation is a viable option only when the employment relationship has been broken off."). *See also* Shannon Vincent, *Comment, Unbalanced Responses to Employers Getting Even: The Circuit Split Over What Constitutes a Title VII-Prohibited Retaliatory Adverse Employment Action*, 7 U. Pa. J. Lab. & Emp. L. 991, 996 (2005) (noting the price paid in high litigation costs and overbroad employer liability). How much more efficient and productive if the dispute is promptly resolved, the employee made whole through the standard, appropriate remedies, and the employment relationship resumed. "The purposes of Title VII are best served when parties, where possible, attack discrimination within the context of their existing employment relationships." *Edwards v. Occidental Chemical Corp.*, 892 F.2d 1442, 1449 (9th Cir. 1990); *E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746, 755 (3rd Cir. 1997); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 342-43 (10th Cir. 1986); *Clark v. Marsh*, 665 F.2d

1168, 1173 (D.C. Cir. 1981); *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980).

These policy considerations motivated the courts in several cases in which temporary setbacks, subsequently corrected, do not rise to the level of an adverse employment action. These include:

- *Shohadaee v. Metropolitan Government of Nashville and Davidson County*, 150 Fed. Appx. 402, 405 (6th Cir. 2005) (" [a]lthough Plaintiff was initially denied tenure, she was given another opportunity to prove herself. During that year, she did not lose any income or benefits. She does not contend that the terms and conditions of her employment materially changed. Plaintiff is no worse off with respect to seniority, income, or benefits having been granted tenure after her fourth year rather than after her third year.").

- *Taylor v. Small*, 350 F.3d 1286, 1293-94 (D.C. Cir. 2003) (holding that an employer can cure an otherwise adverse employment action before the action becomes a subject of litigation and adopting the district court's reasoning: "Permitting employers the opportunity to correct workplace wrongs prior to litigation is the objective of the EEO process. If a plaintiff were permitted a right to sue even if his or her employer had corrected the grievance, there would be absolutely no incentive for employers to make adjustments for past conduct during the EEO process.").

- *Brooks v. City of San Mateo*, 229 F.3d 917, 929-30 (9th Cir. 2000) (with regard to a withdrawn negative performance evaluation, the court held: "Nevertheless, the evaluation here was not an adverse employment action because it was subject to modification by the city. Brooks refused to accept the review and appealed, but she abandoned her job while the appeal was pending. Because

the evaluation could well have been changed on appeal, it was not sufficiently final to constitute an adverse employment action." Moreover, when Brooks complained about her assigned shift and that her vacation preferences had been denied, the employer reversed course, changed her shift, and granted the requested vacation time. Thus, the delay in obtaining the favored shift and vacation time were not adverse employment actions.).

- *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542, 546 (6th Cir. 1999) (with regard to a tenure decision delayed for a year, the court held: "Dobbs-Weinstein succeeded in the grievance process, and Vanderbilt's final decision was to grant her tenure. She has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII. To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.").

- *Stewart v. Evans*, 275 F.3d 1126, 1135-36 (D.C. Cir. 2002) (attempt to obstruct federal employee's award nomination was not an adverse employment action because the employee eventually received the award; further, delay in plaintiff's seeking appointment was not actionable retaliation. In rejecting the employee's claim because she ultimately obtained every workplace advantage that she wanted, the court noted: "Title VII does not provide relief for victims of attempted retaliation.").

- *Amro v. Boeing Co.*, 232 F.3d 790, 797-98 (10th Cir. 2000) (finding that mere delay in granting the plaintiff's desired transfer did not constitute an adverse employment action even though it meant plaintiff had to continue working under supervisor who allegedly harassed him

because plaintiff failed to show any other negative or unfavorable effect of that delay).

- *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587-89 (11th Cir. 2000) (finding that the assignment of professor to teach more credit hours than other professors and to teach classes on three different campuses during one session was not adverse employment action because the assignment was a mistake and it was promptly corrected so that employee never suffered any actual consequences; further, threatened letters that were never actually written did not meet threshold level of substantiality necessary to be cognizable under the antiretaliation clause. The court held: "A proposed action that is corrected as soon as the proper official is made aware of it and before it goes into effect, so that the employee does not actually suffer any consequence, is not 'adverse.'").

The common thread in these cases is that workplaces "are rarely idyllic retreats." *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996). Instead, they are "complex environments in which decisions are made by a variety of people for a variety of reasons." Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 Baylor L. Rev. 381, 382 (1998). Because of the nature of the workplace, the multi-faceted decisionmaking, and the expressed judicial desire to let errors be corrected prior to litigation, an employer ought to be able to use the standard practice of suspension/investigation/reinstatement with backpay in response to alleged insubordination. This is so regardless of whether the employee previously exercised a protected right. An employer should not be "paralyzed into inaction once an employee has lodged a complaint under Title VII, making such a complaint tantamount to a 'get out of jail free' card for employees engaged in job misconduct." *Brooks*, 229 F.3d 917 at 928.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be *reversed*.

DATED: January, 2006.

Respectfully submitted,

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(7)

No. 05-259

FILED

JAN 26 2006

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether an employer may be held liable under section 704 of the Civil Rights Act of 1964 for assigning an employee duties within her job description, or for a temporary suspension rescinded with full back pay after the employer completed an investigation.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), formerly known as Burlington Northern Santa Fe Railway Co., is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation. No publicly held company owns 10% or more of the stock of Burlington Northern Santa Fe Corporation.

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OPINIONS BELOW

The order of the United States District Court for the Western District of Tennessee, which denied BNSF's motion for judgment as a matter of law or a new trial, is unreported, and is reproduced in the Petition Appendix ("Pet. App.") at 116a-122a. The Sixth Circuit's initial decision is reported at 310 F.3d 443 (6th Cir. 2002), and is reproduced at Pet. App. 84a-115a. The Sixth Circuit granted rehearing en banc in an order reported at 321 F.3d 1203 (6th Cir. 2003), and reproduced at Pet. App. 123a-124a. The en banc decision is published at 364 F.3d 789 (6th Cir. 2004), and reproduced at Pet. App. 1a-83a. Following that decision, the Sixth Circuit denied a petition for further rehearing en banc, in an unpublished order that is reproduced at Pet. App. 125a-126a.

JURISDICTION

The court of appeals, sitting en banc, entered judgment on April 14, 2004, Pet. App. 1a, and denied further rehearing en banc on April 26, 2005, *id.* at 125a-126a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On July 20, 2005, Justice Stevens extended the time for filing a petition in this case to and including August 24, 2005.

STATUTES OR OTHER PROVISIONS INVOLVED

Sections 701, 703, 704, 706, 709 and 717 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, 2000e-2, 2000e-3, 2000e-5, 2000e-8 and 2000e-16) are excerpted in the Appendix to this brief.

STATEMENT OF THE CASE

The decision below dramatically expands without warrant the reach of section 704 of the Civil Rights Act of 1964, which prohibits discrimination against persons who oppose unlawful employment practices or participate in Title VII enforcement proceedings. The Sixth Circuit held that an em-

ployer can be liable for assigning an employee tasks within her job description, and for a temporary suspension that the employer rescinded (with full back pay) after investigation. Neither action is "an official act of the enterprise" that causes "a significant change in employment status," *Burlington Industries* v. *Ellerth*, 524 U.S. 742, 761 (1998), and thus neither can give rise to Title VII liability. Accordingly, the judgment below should be reversed.

1. Respondent Sheila White held the position of "Maintenance of Way Laborer" at BNSF's Tennessee Rail Yard in Memphis. Joint Appendix (JA) 58-61. The BNSF "Position Description" summarizes White's position as follows:

> The Maintenance of Way Laborer removes and replaces track components (e.g., ties, rails, bars, etc.) using various power and non-power hand tools. The Maintenance of Way Laborer may also lift and carry track material, cut brush, trees and vegetation, and clear the right-of-way of junk, litter and cargo spillage.

Id. at 58. The Position Description details "Key Work Activities" that are part of the job, most of which concern track and right-of-way maintenance and repair. *Id.* at 58-59. The last of these is that the laborer "[p]erforms all qualified duties, as necessary or requested by management." *Id.* at 59.

White's Position Description reflects that her job was physically demanding, and required substantial exertion and outdoor work in all kinds of weather. In addition to other skills, the Position Description lists as "Key Skill Requirements" the abilities:

- "to maintain balance while working in or around moving equipment, on uneven terrain, or on track ballast";
- "to lift or carry objects ... weighing over 50 pounds";
- "to maintain a high level of muscular exertion for an

extended period of time, involving the hands, arms, back or legs to lift, push, roll or carry objects"; and

- "to make quick or repeated movements (bending, stretching, twisting, reaching) with arms, legs, or body."

JA 60-61. The Position Description specifically provides that the job "involves working outdoors in a variety of weather conditions (e.g., heat, rain, wind, humidity, etc.)," "requires working around moving or heavy equipment," and "involves exposure to above average noise level." *Id.* at 61.

One of the Maintenance of Way duties at the yard involved operating a forklift to move supplies that were delivered to a loading dock. White had prior forklift experience and was assigned to operate the forklift. She testified that she spent a "majority" of her time using a forklift to unload materials that were delivered to the railyard, and a "good bit" of her time on other maintenance-of-way duties, which included working on derailments. I Trial Transcript ("Tr.") 87, 104-05; II Tr. 194-96; see also III Tr. 695. It is undisputed that the applicable collective bargaining agreement did not define a separate position for a forklift operator. The parties stipulated at trial that White was hired as a Maintenance of Way Laborer. I Tr. 38; II Tr. 303; IV Tr. 747. She operated a forklift as one aspect of the general track laborer duties she performed, which included a broad range of tasks related to railroad track maintenance. II Tr. 340; III Tr. 524, 530.

2. On September 16, 1997, White, who was the only woman working as a Maintenance of Way Laborer in the yard, complained that she was the victim of sexually harassing conduct by her immediate supervisor, Bill Joiner. JA 29. BNSF investigated, suspended Joiner without pay for ten days, and ordered him to attend a program on preventing sexual harassment. II Tr. 411, 420. On September 26, 1997, the roadmaster of the Tennessee Yard, Marvin Brown, informed White of the disciplinary action against Joiner. I Tr. 119-20.

At the same time, Brown informed White that she would not be assigned forklift duties. *Id.* Brown's explanation (which was disputed at trial) was that during the course of the investigation, the company discovered that other employees in the yard believed White had been unfairly assigned forklift duties (which are perceived by some as less physically demanding and cleaner than other track work, I Tr. 127-28; II Tr. 407), because other employees had greater seniority, III Tr. 505-06, 534, 617-18. The forklift duties were assigned to an employee with greater seniority, III Tr. 543, and White performed other duties within her job description as a Maintenance of Way Laborer, I Tr. 126-27; JA 58-61.

After being notified of this change in assignment, on October 10, 1997, White filed a charge with the EEOC alleging sex discrimination and retaliation. The discrimination charge was based on the original, allegedly harassing actions by Joiner, and the retaliation charge related to the change in White's duties. JA 29. On December 4, 1997, White filed a second charge of discrimination and retaliation, alleging among other things that Brown had placed her on increased surveillance, *id.* at 30; however, the EEOC determined that it could find no basis for this claim, *id.* at 22-23. That charge was mailed to Brown on December 8, 1997. IV Tr. 747.

Three days later, while on the right-of-way supporting a mobile crew, White was involved in a dispute with a supervisory employee, Sharkey, when she refused to accompany him as instructed. I Tr. 151-53. Sharkey reported White's acts to Brown. With authority from Brown, Sharkey informed White that she was suspended from service pending investigation for insubordination. II Tr. 188, 446; JA 31; see BNSF, *Employee Safety Rules*, Rule S-28.6, at 54 (Oct. 31, 2004), *available at* http://www.bnsf.com/employees/safety/pdf/EmployeeSafRevised080204.pdf (insubordination is a safety violation).

Employee discipline is governed by Rules 90 and 91 of the applicable collective bargaining agreement ("CBA") between the railroad and the Brotherhood of Maintenance of Way Em-

ployes. JA 56-57. Because Maintenance of Way employees are responsible for maintaining tracks and rights-of-way, they often work in mobile crews far from the railyard. To manage the potential dangers of railroading, it is critical that safety and operating rules are observed and lines of workforce authority respected. Accordingly, supervisors may remove recalcitrant, dangerous, or insubordinate workers from service.

Disciplinary removal from service may be ordered by relatively low-level supervisors in the field on a real-time basis, and the railroad and the union have agreed upon a procedure for the railroad to investigate any tentative disciplinary action that the employee believes is unwarranted, and to modify or revoke the action where appropriate. Under Rule 91 of the CBA, "[e]mploye[e]s disciplined or dismissed will be advised of the precise charge of such action, in writing if requested." CBA R. 91(a) (JA 56). An employee who considers the disciplinary action unfair or unjust "shall make written request for an investigation" within 15 days. CBA R. 91(b)(1) (JA 56).

At that point, the CBA provides a highly expedited timetable for an employer decision on discipline. Once the employee makes a proper written request, "a fair and impartial investigation .... will be held within 15 days," during which union representatives may be involved and the employee has the right to present any witnesses he desires. *Id.* R. 91(b)(2)-(3) (JA 56). The CBA dictates that "[*a*] *decision will be rendered by the Carrier* within 10 days after completion of the investigation." *Id.* R. 91(b)(5) (JA 57) (emphasis added). The Carrier may decrease or (as here) rescind the initial discipline; it also may impose additional discipline. III Tr. 552. Thus, it is the decision after the investigation that represents the company's final "decision" as to whether any discipline is proper. If the company decides not to sustain the charge against the employee, the CBA restores the employee to her former status: the charge "shall be stricken from the record," and "[i]f by reason of such unsustained charge the employe[e]

has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of the service of the Carrier." CBA R. 91(b)(6) (JA 57).

These procedures established in the CBA for the Carrier's disciplinary decision are separate and apart from—and prior to—the invocation of grievance procedures. If the employee is "dissatisfied" with the company's "decision," she has "the right to appeal," CBA R. 91(b)(7) (JA 57), but the appeal is governed by the procedures set forth in a separate rule of the CBA (Rule 90). *Id.* RR. 90, 91(b)(8) (JA 54-56, 57). In other words, the Rule 91 investigatory procedure (through which White's complaint about her suspension was resolved) is part of the company's decisionmaking process, which can be (but was not here) appealed through the Rule 90 grievance mechanism. White requested a Rule 91 investigation of the suspension imposed by Brown within the 15 days specified by the CBA. II Trial Tr. 345. The Carrier's "decision," CBA R. 91(b)(5), (7) (JA 57), was that White's removal from service was unwarranted. That decision was made by the terminal manager of the Tennessee Yard. White was returned to service with full back pay (covering the 37 days she was suspended) and the charges were expunged from her record. III Tr. 642; JA 62; Pet. App. 7a.

3. After exhausting her administrative remedies with the EEOC, JA 20-25, 31, White filed suit against BNSF in the United States District Court for the Western District of Tennessee, alleging sex discrimination and retaliation, see JA 13-32. White presented two alternative theories of retaliation: that Brown retaliated against her by assigning the forklift duties she performed to another employee in September 1997 because she had filed her internal complaint, and by suspending her pending investigation in December 1997 because she had filed EEOC charges. *Id.*

The case was tried to a jury, which found for BNSF on White's underlying sex discrimination claim, and found for

White on her retaliation claim. Pet. App. 7a. The jury awarded her $43,250 in compensatory damages for emotional distress and related doctors' bills. *Id.*; JA 4. The district court denied BNSF's motion for a judgment as a matter of law, Pet. App. 116a-122a, and awarded White attorney's fees, see *id.* at 7a. BNSF appealed.[1]

A divided panel of the Sixth Circuit ruled that the judgment against BNSF should be reversed because neither action taken against White was sufficiently adverse to state a claim for retaliation under Title VII. Pet. App. 85a. It noted that White had suffered no loss of job title, and no diminution of salary, wages or benefits. *Id.* at 95a. The panel found it immaterial whether the duties she had been assigned to perform while on the right-of-way may have been more physically demanding than operating a forklift; BNSF "hired White as a track maintenance worker," and "[o]ne of her explicit job responsibilities was to maintain the railroad tracks." Accordingly, the panel held, "We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her." *Id.* at 96a. Nor, the panel held, was White's temporary suspension pending investigation (followed by reinstatement with full back pay) an adverse employment action. Her suspension was "the first step in the employment decision making process," and "was only an interim decision." *Id.* at 101a.

The court of appeals reheard the case en banc, and affirmed the verdict. After a lengthy discussion about the proper test for unlawful retaliation under section 704(a), the court concluded that the statute by its terms prohibits "'*any kind* of adverse action,'" and simply asserted that White's temporary suspension "is not the type of employment action that this

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[1] White cross-appealed the district court's ruling that she was required to prove her entitlement to punitive damages by clear and convincing evidence, and prevailed. Pet. App. 28a-34a. That issue is not before this Court. *See* Order of Dec. 5, 2005, 74 U.S.L.W. 3334 (U.S. Dec. 6, 2005) (05-259).

court developed the adverse-employment-action element to filter." Pet. App. 22a. As to the decision not to assign White forklift duties, the court concluded that the "new position" to which White purportedly was "transfer[red]" was "more arduous and 'dirtier,'" and that the forklift position had been more prestigious. *Id.* at 25a. Accordingly, the court concluded that this constituted an unlawful demotion, as "evidenced by 'indices ... unique to [the] particular situation.'" *Id.* (omission and alteration in original).

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment. Section 703 defines in detail the various forms of discrimination on the basis of race, color, religion, sex, and national origin that are prohibited as "unlawful employment practices" to employers, labor organizations, employment agencies, and joint labor-management committees. Section 704, at issue here, creates a different kind of protected class: It declares it an "unlawful employment practice" for any of the foregoing entities to "discriminate against" those who oppose certain practices as unlawful, or who commence or participate in Title VII proceedings. These are so-called retaliation claims.

A. Most courts of appeals (including, nominally, the court below) employ the same standard under both sections 703 and 704: An employer is only liable for unlawful discrimination when its actions actually affect the terms and conditions of employment. This is the same rule that this Court, drawing on prevailing "adverse employment action" jurisprudence, adopted in determining that sexual harassment culminating in a tangible employment action may be imputed to the employer. *Ellerth*, 524 U.S. at 761.

Even though the Sixth Circuit acknowledged that *Ellerth* states the prevailing standard, it wholly misconceived that standard. This Court in *Ellerth* held that for liability to attach, there must be "an official act of the enterprise, a company

act" that constitutes "a significant change *in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761, 762 (emphasis added); see also *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 134 (2004) (a tangible employment action is "an *employer-sanctioned* adverse action *officially changing* her employment status or situation" (emphasis added)). Such official acts typically have an economic effect on the employee, are documented in company records, require use of internal processes, and are subject to higher management review and approval. *Ellerth*, 524 U.S. at 762. Those objectively verifiable traits give the employer the opportunity to monitor and correct lower-level supervisory actions (which ensures the voluntary compliance that this Court has declared a principal objective of Title VII).

B. Neither of White's retaliation claims satisfies the *Ellerth* standard. A supervisor's alteration of the mix of duties that an employee performs within her existing job classification simply is not an official act of the enterprise that constitutes a "significant change in employment status," and therefore is not an "unlawful employment practice" under section 704. *Ellerth* quoted approvingly the doctrine developed in the courts of appeals that a reassignment to a different position with *significantly* adverse changes in responsibilities may be actionable, but noted that mere alteration of job duties is not enough. Here, White was not transferred or demoted; at all times she retained her position as a Maintenance of Way Laborer at the Tennessee Yard. The track labor duties she was given were the central and essential duties of her position, and no different in kind from those she previously had performed or those that her fellow workers of equal or greater seniority were performing. Even in cases of actual position transfers, courts properly have held that simply being required to perform more stressful or challenging duties cannot support a Title VII claim. The Sixth Circuit's contrary rule would en-

mesh the courts in review of minor, commonplace supervisory task assignments, contrary to the Title VII policy against interference with traditional management prerogatives.

C. The Sixth Circuit's second holding—that an employer can be liable for a temporary suspension pending investigation that the employer rescinds with full back pay—is likewise irreconcilable with *Ellerth*. This Court has specifically held that unions and management may agree by contract as to what constitutes the employer's "decision" on personnel matters, and it is that "decision" that marks the point at which the allegedly unlawful employment practice occurs for Title VII purposes. Here, the collective bargaining agreement specifically provides that the "decision of the Carrier" on discipline occurs after investigation, and BNSF's "decision" was that White should be returned to work and awarded full back pay. The initial suspension pending investigation was not an adverse employment action. It was not an "employer-sanctioned adverse action officially changing her employment status or situation," *Suders*, 542 U.S. at 134, but rather an interim measure designed to allow BNSF to determine if it would approve or disapprove the supervisor's acts. It would undermine Title VII's fundamental purpose of encouraging voluntary compliance if employers could not avoid liability by reviewing supervisory discipline and making reasoned and informed decisions after investigation. Moreover, the Sixth Circuit's rule would place a significant penalty on the common and necessary practice of removing dangerous or disruptive employees from service without pay, subject to reinstatement with full back pay if the employer determines, after investigation, that removal was not appropriate.

D. Finally, this Court should reject the EEOC's attempt to reshape section 704 jurisprudence by eliminating the traditional adverse-employment-action standard, and substituting an unworkable standard that the employer is liable for any action, no matter how slight, that is reasonably likely to deter the charging party or others from protected activity. That

standard, as the Sixth Circuit pointed out, has no basis in the text of the statute. It perversely presumes that Congress intended to extend broader protection to Title VII complaints against retaliation than to employees who face discrimination in the workplace based on race, color, religion, sex, and national origin. The EEOC's interpretation creates a super-protected class, such that some adverse treatment of a female or minority employee for discriminatory reasons will not be actionable, but will become so if the employee has filed a retaliation claim. This distinction has no warrant in the statute, and creates disturbing workplace dynamics. The proper standard is the one set forth in *Ellerth*, which looks to whether employer conduct significantly changes employment status. BNSF clearly prevails under that standard.

ARGUMENT

I. EMPLOYER CONDUCT IS ACTIONABLE UNDER SECTION 704 ONLY IF IT ADVERSELY AND SIGNIFICANTLY CHANGES EMPLOYMENT STATUS.

In enacting Title VII, it "was the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices" that have created employment disadvantage for protected groups. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). Title VII promotes the broad public "interest, shared by employer, employee, and consumer," in "efficient and trustworthy workmanship assured through fair and ... neutral employment and personnel decisions." *Id.* at 801. "The statute's primary objective is a prophylactic one; it aims, chiefly, 'not to provide redress but to avoid harm.'" *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545 (1999) (citation omitted) (quoting *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998)). "[T]he preferred means for achieving this goal" is "[c]ooperation and voluntary compliance." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). At the same time, Title

VII was meant to preserve "'management prerogatives ... to the greatest extent possible.'" *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 206 (1979); *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (Title VII was "not intended to 'diminish traditional management prerogatives'").

At issue here is the scope of section 704 of Title VII. The statute's preceding section outlaws employment discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a). Section 704 (entitled "Other unlawful employment practices") further makes it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment" because the employee has opposed conduct that is unlawful under Title VII, or commenced or participated in Title VII proceedings. *Id.* § 2000e-3(a).

The lower courts (and the EEOC, see *infra* Section II) all agree that the term "discriminate against" in section 704 cannot be interpreted, if it is to serve the statute's purposes, to reach every conceivable instance of different or adverse treatment of employees who have engaged in protected activity. See Pet. 11-16 (discussing cases); Pet. App. 9a ("Title VII does not define the phrase 'discriminate against,' which is repeated in Title VII's other anti-discrimination provisions, but courts have made clear that not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (Alito, J.) (section 704 does not reach every "trivial personnel action that an irritable, chip-on-the-shoulder employee did not like" (internal quotation marks omitted)).

The Sixth Circuit below (like the vast majority of courts of appeals) properly has concluded that the same standard for determining whether discrimination is an actionable "unfair employment practice" applies under both sections 703 and 704. Pet App. 17a-18a & n.5. "To prevent lawsuits based upon trivial workplace dissatisfactions," the Sixth Circuit requires a plaintiff to prove "an 'adverse employment action' to

support a Title VII claim," which requires a "'materially adverse change in the terms and conditions of plaintiff's employment.'" *Id.* at 10a (alteration omitted). Not every trifling slight in the employment context should become a federal case. Although the court below paid lip service to its traditional "adverse employment action" standard, and asserted that it embodied "the same concept" as the "tangible employment action" standard set forth by this Court in *Ellerth*, see Pet. App. 10a n.1, the Sixth Circuit radically redefined that standard to encompass conduct that would not be actionable under *Ellerth* or under the law of the courts of appeals that are faithful to *Ellerth*. See, *e.g.*, *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997).

This Court should hold that section 704(a) of the Civil Rights Act, like section 703, prohibits as an "unlawful employment practice" only discrimination that results in "a significant change in employment status." *Ellerth*, 524 U.S. at 761. That standard entitles BNSF to judgment as a matter of law on White's retaliation claims.

A. The Same Standard for Discrimination Applies Under Sections 703 and 704 of the Act.

We begin on common ground with the court below: namely, that the standards for determining what employer conduct is actionable as "discrimination" in sections 703 and 704 of the Act are the same. Pet. App. 17a-18a & n.5.

The starting point in any matter of statutory construction is the text of the statute. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). This Court has admonished that "[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole." *United States* v. *Morton*, 467 U.S. 822, 828 (1984); *Bailey* v. *United States*, 516 U.S. 137, 145 (1995); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). "Statutory construction ... is a holistic endeavor" directed to determining which among "permissible meanings produces a substantive effect that is com-

patible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "'[I]n expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) (second alteration and omission in original) (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987)).

Section 704(a) makes it an "unlawful employment practice" for employers and other specified entities to "discriminate against" certain persons who oppose unlawful employment practices, or who commence or participate in Title VII proceedings. 42 U.S.C. § 2000e-3(a). The same terminology of "unlawful employment practice" and "discriminate against" appears in both sections 703 and 704 of the Act, see App. 2, 11, and so the two provisions should be read in harmony. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568, 570 (1995); cf. 2 Norman J. Singer, *Sutherland Statutory Construction* § 47:06, at 226 (6th ed. 2000) ("In construing ... the ... body[] of an act, ... all matter therein must be interpreted together."); see also *id.* § 46:5. Indeed, the structure of the statute demonstrates that the two provisions are closely related.

Section 703 contains the general prohibition against discrimination on the basis of race, color, religion, sex, and national origin. It is a lengthy and highly reticulated provision that identifies the major entities that may be responsible for employment discrimination, and proscribes specific kinds of discrimination by such entities as "unlawful employment practices." It does so for each of four types of employment entities: employers, employment agencies, labor organizations, and joint labor-management committees responsible for apprenticeship and training programs. 42 U.S.C. § 2000e-2(a)-(d). Some of the proscribed discriminatory conduct is specific to one type of entity; other conduct applies to multiple entities. Where employers are concerned, for instance, it is an "unlawful employment practice ... to fail or refuse to

hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," based on protected characteristics. *Id.* § 2000e-2(a). Employers also may not "limit, segregate, or classify [their] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," on such grounds. *Id.* § 2000e-2(a)(2). Employment agencies, for their part, may not "fail or refuse to refer for employment, or otherwise ... discriminate against[] any individual" based on protected status. *Id.* § 2000e-2(b). Specific prohibitions also forbid discrimination by labor organizations in their membership practices and their dealings with employers with regard to individual employees. *Id.* § 2000e-2(c).

Some of section 703's prohibitions overlap. For example, the prohibition of discrimination in training and apprenticeship applies to employers, labor organizations, and joint labor-management committees. *Id.* § 2000e-2(d). The prohibition against the "discriminatory use of test scores" applies to all four types of regulated entities. *Id.* § 2000e-2(l); see also *id.* § 2000e(n) (definition of "respondent"). Finally, section 703 sets forth a number of exemptions for practices that are not considered an "unlawful employment practice," such as discrimination based on bona fide occupational qualifications or seniority systems. *Id.* § 2000e-2(e), (h).

Sections 703 and 704 operate in tandem. Section 704(a) prohibits "discriminat[ion]" against one who "oppose[s]" any unlawful employment practice under Title VII, and discrimination against one who commences or participates in a Title VII "investigation, proceeding, or hearing," *id.* § 2000e-3(a); in short, it prohibits protected-activity discrimination. Section 704 does not restate all the detailed, sometimes distinctive, sometimes overlapping types of discrimination that are forbidden to each of the types of employment entities under section 703. Rather, in summary fashion, section 704 identi-

fies each of the four types of employment entities listed in § 2000e-2(a) through (d), and the specific types of persons protected against discrimination by each entity, and then states a single comprehensive prohibition that simply forbids covered entities from "discriminat[ing] against" such persons for opposing unlawful employment practices or participating in Title VII proceedings:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id. § 2000e-3(a).

The most natural reading of section 704 is not that it profoundly redefines the type of conduct that constitutes actionable "discrimination," but rather that it creates an additional *protected class*: The same protection that section 703 affords against discrimination on the basis of protected characteristics, is afforded in section 704 to those who engage in protected activity related to Title VII enforcement. Notably, section 704(a) does not use the term "retaliation" or any variant of it; rather, it simply prohibits "discriminat[ion]" on the basis of certain protected activity. Thus, just as an employer may not "fail or refuse to hire or ... discharge any individual, or otherwise ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," because the individual is black or female or Mexican or Jewish, *id.* § 2000e-2(a), it also may not do so because

that individual has engaged in protected conduct that aids in the enforcement of Title VII.

Courts of appeals that have recognized the parallelism in sections 703 and 704 point out that any other reading would have the anomalous effect of extending *lesser* protection to the most deplorable, historically destructive forms of discrimination—the discrimination on the basis of the irrelevant personal characteristics of race, color, religion, sex, or national origin that has long consigned certain groups to lesser social and economic status—than to discrimination against those who oppose such invidious practices:

> Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000e-2. The prohibition on retaliation exists simply to ensure that employees will not fear to assert their substantive rights, which are the heart of Title VII.

Ross v. *Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985), *overruled on other grounds by Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). Accordingly, nearly every court of appeals has read sections 703 and 704(a) in tandem, as coextensive and complementary provisions. See, *e.g.*, *Robinson*, 120 F.3d at 1300 ("'The language of "materially adverse employment action" that some courts employ in retaliation cases is a paraphrase of Title VII's basic prohibition against employment discrimination, found in 42 U.S.C. §§ 2000e-2(a)(1) and (2).'").[2]

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[2] *Accord Holcomb* v. *Powell*, __ F.3d __, 2006 WL 45853, at *10 (D.C. Cir. Jan. 10, 2006) (applying terms-and-conditions requirement to retaliation claim); *Fairbrother* v. *Morrison*, 412 F.3d 39, 56 (2d Cir. 2005); *Turner* v. *Gonzalez*, 421 F.3d 688, 696 (8th Cir. 2005); *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) ("What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected 'the terms, conditions, or benefits' of the plaintiff's employment."); *Sanchez* v. *Denver Pub. Schs.*, 164 F.3d

Section 704 is not the only place in Title VII where Congress used a summary prohibition against discrimination to incorporate the more detailed discrimination protections set forth in preceding provisions of the Act. In 1972, Congress extended Title VII protections to federal government employees, declaring that "there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2158. Section 717 of Title VII summarily requires that "[a]ll personnel actions" against federal employees or applicants "be free from any discrimination" based on protected characteristics. 42 U.S.C. § 2000e-16(a). Courts have held that the section 703 and 704 standards likewise apply in claims brought under section 717 for unlawful "personnel actions."[3]

Even apart from section 703, the language of section 704 itself indicates that a materially adverse employment action is necessary to prove employer liability. Section 704 declares unlawful an "*employment practice*" of "discriminat[ing] against" an employee who opposes unlawful discrimination or participates in Title VII enforcement. 42 U.S.C. § 2000e-3(a) (emphasis added). This choice of language is significant, and connotes discrimination that negatively affects *the employment* of employees, not just any discriminatory act by a corporate agent against an employee. *Nelson* v. *Upsala Col-*

527, 533 (10th Cir. 1998); *Randlett* v. *Shalala*, 118 F.3d 857, 862 (1st Cir. 1997).

[3] *E.g.*, *Brown* v. *Brody*, 199 F.3d 446, 452-55 (D.C. Cir. 1999) (section 703); *Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692 (5th Cir. 2004); *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 450 (9th Cir. 1976) ("in enacting § 2000e-16, Congress intended to, and did incorporate, into that section the provisions of the Civil Rights Act prohibiting harassment or retaliation for the exercise of those remedial rights established by the Act"); *see Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 n.14 (1977) ("Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike.").

lege, 51 F.3d 383, 388 (3d Cir. 1995) ("The words 'employment practice' suggest that the retaliatory conduct must relate to an employment relationship.") An "employment practice" that "discriminate[s] against" the employee necessarily requires final and materially adverse action affecting the employment status and opportunity of the employee. *Dodge* v. *Giant Food*, 488 F.2d 1333, 1335 (D.C. Cir. 1973) (section 703 case) (the term "discriminate against" does not refer to all differences in treatment, but "only those classifications or discriminations which afford significant employment opportunities to one sex in favor of the other"); Pet. App. 17a ("Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase "discriminate against" in each of its anti-discrimination provisions.").

While many acts of discrimination may occur in the workplace, it is difficult to conceive how employer discrimination could rise to the level of an "employment practice" unless it affected the "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a), given the comprehensiveness of that latter phrase. "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent '"to strike at the entire spectrum of disparate treatment of men and women"' in employment." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986); *Hishon* v. *King & Spalding*, 467 U.S. 69, 75-76 (1984) ("terms, conditions and privileges of employment" includes not only contractual terms and benefits but also "benefits that comprise 'the incidents of employment,' or that form 'an aspect of the relationship between employer and employees'" (internal citations omitted)).

Another provision of Title VII confirms that, to be actionable, an employer's action must be complete and must materially affect terms and conditions of employment. Sections 703 and 704 alike are enforced by a "civil action." 42 U.S.C. § 2000e-5(f)(1). Title VII originally provided a civil judicial action "to enjoin the respondent from engaging in such

unlawful employment practice," and authorized equitable relief such as reinstatement and back pay. Pub. L. No. 88-352, § 706(f), (g), 78 Stat. 241, 259-61 (1964) (codified as amended at 42 U.S.C. § 2000e-5(f), (g)). Congress would not have permitted invocation of the district court's extraordinary equitable powers to redress every minor discriminatory act that might aggrieve an employee. See *Weinberger* v. *Barcelo*, 456 U.S. 305, 311-12 (1982) ("It goes without saying that an injunction is an equitable remedy. It 'is not a remedy which issues as of course,' or 'to restrain an act the injurious consequences of which are merely trifling.'" (internal citations omitted)). The Civil Rights Act of 1991 broadened the *remedies* available to Title VII claimants (by making compensatory and punitive damages available, 42 U.S.C. § 1981a(a)(1), (b))—and thereby "put expansive pressure on the definition" of the statutory terms, *Ellerth*, 524 U.S. at 743—but importantly left unchanged the central Title VII *liability* language of "employment practice" and "discriminate against" in sections 703 and 704. In any event, the authorization of a civil jury action for damages underscores that Congress believed only material employment actions affecting terms and conditions of employment would be actionable.[4]

The requirement of an adverse employment action affecting the employment relationship promotes statutory purposes by imposing a meaningful threshold of materiality that "prevent[s] lawsuits based upon trivial workplace dissatisfac-

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[4] Title VII's recordkeeping provision also emphasizes the point. Congress expected employers to keep records relating to whether unlawful employment practices are occurring. Under section 708 of the Act, "[e]very employer, employment agency, and labor organization subject to this subchapter shall ... make and keep such records relevant to the determinations of whether unlawful employment practices *have been or are being committed*" as the EEOC requires by regulation or order. 42 U.S.C. § 2000e-8(c) (emphasis added). Tangible employment actions that represent the "official act of the enterprise" are the kind "documented in official company records," *Ellerth*, 524 U.S. at 762; so too is the execution of corporate policies against sexual harassment, *cf. id.* at 764-65.

tions." Pet. App. 10a. Title VII does not grant a federal civil action for "all workplace conduct" that is discriminatory or harassing, *Meritor*, 477 U.S. at 67, and is not meant to create a "general civility code," *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Only a "'tangible change in duties or working conditions that constitute[s] a material disadvantage'" is actionable. *Phillips* v. *Collings*, 256 F.3d 843, 848 (8th Cir. 2001). Discriminatory treatment causing intangible harms may also give rise to liability, but only if it alters the terms and conditions of employment to the employee's detriment. *Suders*, 542 U.S. at 143 ("Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment." (internal quotation marks omitted)). Thus, this Court has held that racial or sexual harassment not involving tangible employment action is actionable under Title VII if it is "*sufficiently severe or pervasive* 'to alter the conditions of [the victim's] employment *and* create an abusive work environment.'" *Meritor*, 477 U.S. at 67 (emphasis added) (alteration in original); *accord Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment ... is beyond Title VII's purview."); *Faragher*, 524 U.S. at 788 (harassment "must be *extreme* to amount to a change in the terms and conditions of employment" (emphasis added)). Incorporating the materially adverse employment action standard is thus the most natural way to read section 704 that is consonant with the text, structure, and purposes of Title VII.

B. This Court's Decision in *Burlington Industries* v. *Ellerth* Defines the Substantive Standard of Employer Liability.

This Court explained the "adverse employment action" standard in *Ellerth*, in which it addressed the circumstances under which an employer may be held vicariously liable under section 703(a) for a supervisor's sexual harassment of a coworker. The Court recognized that "the general rule is that

sexual harassment by a supervisor is not conduct within the scope of employment," and thus turned to whether the employer might still be held liable on agency grounds because the wrongdoer was aided by the agency relationship. 524 U.S. at 757-60. This Court held that vicarious liability would only arise on that basis if (a) the hostile work environment culminated in a tangible employment action against the employee, or (b) the employer could not prove that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer in the exercise of due care. *Id.* at 761-62, 765; *Faragher*, 524 U.S. at 807.

Ellerth marks the path for resolution of this case. This Court "import[ed]" its "tangible employment action" standard from the prevailing "adverse employment action" jurisprudence in the courts of appeals under Title VII and other anti-discrimination laws. 524 U.S. at 761. The Court defined that term as "an official act of the enterprise" that constitutes "*a significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761, 762 (emphasis added). While disclaiming endorsement of the specific results of any case, *Ellerth* cited approvingly the limitations the courts of appeals had placed on "adverse employment actions." Conduct resulting in a "'bruised ego,'" a "demotion without change in pay, benefits, duties, or prestige," and "reassignment to [a] more inconvenient job" were all "insufficient" to create employer liability. *Id.* (citing *Flaherty* v. *Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994); *Kocsis* v. *Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); *and Harlston* v. *McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

As this Court elaborated in *Suders*, a tangible employment action is "an *employer-sanctioned* adverse action *officially changing* her employment status or situation." *Suders*, 542 U.S. at 134 (emphasis added). This standard reflects (as noted above) that, even though the term "employer" under

Title VII is broadly defined to include "any agent," 42 U.S.C. § 2000e(b), Congress did not intend that every discriminatory act of a corporate agent would give rise to Title VII liability:

> Unlike injuries that could equally be inflicted by a co-worker, we stated, tangible employment actions "fall within the special province of the supervisor," who "has been empowered by the company as ... [an] agent to make economic decisions affecting other employees under his or her control." [*Ellerth*, 524 U.S.] at 762. The tangible employment action, the Court elaborated, is, in essential character, "an official act of the enterprise, a company act." *Ibid.* It is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Ibid.* Often, the supervisor will "use [the company's] internal processes" and thereby "obtain the imprimatur of the enterprise." *Ibid.* Ordinarily, the tangible employment decision "is documented in official company records, and may be subject to review by higher level supervisors." *Ibid.*

Suders, 542 U.S. at 144-45 (omission and first and third alterations in original).

Limiting Title VII liability to meaningful employment actions, like the existence of affirmative defenses for certain adverse employment actions, fosters "Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ellerth*, 524 U.S. at 764. "[O]fficial directions and declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control." *Suders*, 542 U.S. at 148 (noting that absent such "'an official act of the enterprise,'" "the employer ordinarily would have no particular reason" to distinguish constructive discharge resignations from "the typical kind daily occurring in the work force").

In summary, under Title VII an employer may be held liable only for discrimination in the form of a materially ad-

verse employment action—*viz.*, (1) a tangible employment action causing "a significant change in employment status," *Ellerth*, 524 U.S. at 761, *i.e.*, "an employer-sanctioned adverse action officially changing her employment status or situation," *Suders*, 542 U.S. at 134, or (2) other actions or failures to act that are "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (alteration in original); *Faragher*, 524 U.S. at 797-801 (detailing agency rules and defenses relevant to imputation of the latter to employers).

As noted above, the Sixth Circuit answered the broader questions of statutory construction correctly. It rightly held that the standard for determining actionable employer conduct is the same in sections 703 and 704, Pet. App. 17a-18a & n.5; that the standard is whether the conduct was a materially adverse employment action, *id.* at 10a; and that *Ellerth* (which summarized and adopted the prevailing case law on such adverse employment actions) defines the proper standard, *id.* at 10a n.1. Nonetheless, the Sixth Circuit badly misconceived *Ellerth* in holding that the supervisory actions on which White relied to support her judgment met that standard. Neither (1) the assignment to White of duties within her job description other than operating a forklift nor (2) her removal from service pending investigation for insubordination, which was rescinded in a timely manner with full back pay, constitutes an "adverse employment action" that can support liability under *Ellerth* and prevailing case law.

C. Assigning White Routine Duties Within Her Job Description of a Kind That She and Fellow Employees Already Performed Is Not an Adverse Employment Action.

The court below tried to force-fit into the *Ellerth* standard Brown's decision to assign White to non-forklift duties, but its effort to do so cannot withstand scrutiny. According to the court of appeals, BNSF "transferr[ed] White from her forklift

operator job to a standard track laborer job." Pet. App. 25a. Further, the court stated, "the forklift operator position required more qualifications" than her "new position" as a track laborer, and there was evidence that "the forklift operator position was objectively considered a better job." *Id.* Accordingly, the court reasoned, this "transfer[]" was "a demotion," and thus sufficed for Title VII liability as a tangible employment action because it was "a job 'reassignment with significantly different responsibilities.'" *Id.* (quoting *Ellerth*, 524 U.S. at 761).

1. There was no "transfer[]" to "a new position." It is undisputed that White at all times held the position of "Maintenance of Way Laborer" at the Tennessee Yard. Indeed, there existed no separate "forklift operator position." White was hired as a track laborer, and operating a forklift was simply one duty she performed as a track laborer. I Tr. 87; II Tr. 194-96, 340; III Tr. 523-24.

That alone forecloses any claim that White suffered an adverse employment action—*i.e.*, "an employer-sanctioned adverse action *officially changing her employment status or situation*," *Suders*, 542 U.S. at 134 (emphasis added). A supervisor's directive that an employee perform different tasks within her job description is not an official change in employment status or situation. When *Ellerth* referred to "reassignment with significantly different responsibilities," it was referring to assignments to different positions. This is evident from the requirement stated in *Ellerth* (and confirmed by *Suders*) that a tangible employment action is the "official act of the enterprise," which represents "a significant change in employment status and typically "inflicts direct economic harm." 524 U.S. at 761, 762. Each of the four court of appeals cases upon which *Ellerth* relied involved actual transfers to a different position within the company.[5]

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[5] In deriving the tangible employment action standard, this Court in *Ellerth* quoted *Crady* v. *Liberty Nat'l Bank & Trust Co. of Indiana* for the proposition that:

2. Not only is it doublespeak to characterize a mere change in the mix of job tasks as a demotion, but in any event there was no evidence that White suffered "a *significant* change in employment status" in the form of "reassignment with *significantly different* responsibilities." *Ellerth*, 524 U.S. at 761 (emphases added). As the court of appeals stated in *Crady*, in a passage cited by this Court, *id.*, a "demotion" must be evidenced by "significantly diminished material responsibilities," and "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Crady* v. *Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) (no actionable demotion where the transferred employee did not suffer an adverse change in pay or benefits, and the changed job responsibilities to which he was transferred were not "less significant" than his earlier duties).

The rule articulated in *Crady* and applied in *Ellerth* is emblematic of numerous courts' holdings under the adverse-employment-action standard. In *Harlston*, the Eighth Circuit held that a reassignment was not actionable because it did not affect "title, salary, or benefits," despite the fact that the

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> [a] materially adverse change might be indicated by a termination of employment, a *demotion* evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, *significantly diminished material responsibilities*, or other indices that might be unique to a particular situation.

524 U.S. at 761 (quoting 993 F.2d 132, 136 (7th Cir. 1993) (emphasis added)). But, in referring to a "demotion," *Crady* meant an actual transfer to a different job with "significantly diminished material responsibilities." Indeed, the employment action at issue in *Crady* was the transfer of a bank employee "from the Sellersburg branch manager position to a collections officer position in Charleston." 993 F.2d at 134-35. Similarly, *Harlston*—cited by *Ellerth* for the proposition that "reassignment to [a] more inconvenient job" is "insufficient"—involved a transfer to "a different position." *Harlston*, 37 F.3d at 381. The same is true of the other two cases cited in *Ellerth*: In *Kocsis*, the plaintiff had been transferred from the job of nursing supervisor to unit registered nurse, 97 F.3d at 878-79, and in *Flaherty*, the plaintiff was offered a transfer from the position of principal scientist to fuel cell project manager, 31 F.3d at 457.

plaintiff had been shifted to job duties that were "more stressful." 37 F.3d at 381-82. In *Boone* v. *Goldin*, the Fourth Circuit specifically relied upon *Ellerth* to hold that "reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect on her." 178 F.3d 253, 256 (4th Cir. 1999). Many other decisions hold likewise.[6]

3. White suffered no such adverse change in the compensation, terms, conditions or privileges of her job. At all times, she remained within the job for which she was hired. And at all times, she continued to perform the ordinary duties of a Maintenance of Way Laborer that were within her job description, that she had performed, and that her co-workers also performed. Indeed, the duties that White complains about being given are the essence of the position that she held:

> The Maintenance of Way Laborer removes and replaces track components (e.g., ties, rails, bars, etc.) using various power and non-power hand tools. The Maintenance of Way laborer may also lift and carry track material, cut brush, trees and vegetation, and clear the right-of-way of junk, litter, and cargo spillage.

JA 58 (Position Description). The overwhelming majority of a track laborer's duties enumerated in the position description concerned the maintenance of railroad tracks and roadbed.

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[6] *See, e.g.*, *Turner* v. *Gonzalez*, 421 F.3d 688, 697 (8th Cir. 2005) (requiring "a significant change in working conditions or a diminution in the transferred employee's title, salary, or benefits"); *Marrero* v. *Goya of P.R., Inc.*, 304 F.3d at 23 (1st Cir. 2002) ("a transfer or reassignment that involves only minor changes in working conditions normally does not constitute an adverse employment action"); *Galabya* v. *New York City Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) ("a transfer is an adverse employment action if it results in a change in responsibilities so significant as to constitute a setback to the plaintiff's career"); *Williams* v. *Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) ("A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either.").

White's job included the duties of pulling spikes from railroad ties; drilling holes through rails; cutting rails; removing, installing and moving railroad ties; lifting and carrying track material; lifting objects in excess of 50 pounds; maintaining "a high level of muscular exertion for an extended period of time"; and numerous other such manual tasks associated with track maintenance. *Id.* at 58-61.

It should have come as no surprise to White that she would be asked to perform these duties. Not only were they listed on the Position Description, but White had in fact previously lifted heavy objects, see I Tr. 72, 73, 75—which she claims to have enjoyed, see I Tr. 72, and which she touted on her job application, JA 53 (noting her prior "[u]se of hands, heavy lifting, working with jack[] hammers and other heavy machinery"). And, during the period that White operated the forklift, she performed other track laborer duties. White maintained, oiled and swept rail switches, which consumed a "good bit" of her time, II Tr. 194-96. White testified that she worked on a derailment, which of course was track work. I Tr. 104-07. And, her supervisor testified that depending on the volume of the materials that had to be moved with the forklift on a given day, White might have been "out there as much as" the other track laborers were. II Tr. 408.

Thus, even if a shift in the mix of an employee's duties could ever be actionable absent an official reassignment to a new position, there is nothing in the record that rises to the level of demonstrating "significantly different responsibilities," *Ellerth*, 524 U.S. at 761, much less "'a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities,'" *id.* (quoting *Crady*, 993 F.2d at 136). White was not demoted—she retained the same job. And her wage, salary, title, and benefits remained precisely the same. White's *only* claim is that the track duties were "more physical," I Tr. 127, in that they required more heavy lifting, II Tr. 407, and were "much dirtier," I Tr. 128. These

vague assertions simply do not establish "significantly different responsibilities," *Ellerth*, 524 U.S. at 761, particularly given that White already performed these "more physical" and "dirtier" duties some of the time—and they are the same duties performed by her coworkers. "A transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action,' '[o]therwise every trivial personnel action that an irritable ... employee did not like would form the basis of a discrimination suit.'" *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (alteration and omission in original).

Courts repeatedly have held that changes of this sort are not sufficiently material to support Title VII liability. In *Marrero* v. *Goya of Puerto Rico, Inc.*, although the jury could have found that the plaintiff "was required to do more work" in her new job (in addition to other claimed disadvantages), this was not enough. 304 F.3d 7, 24-25 (1st Cir. 2002). In *Conley* v. *Village of Bedford Park*, the plaintiff likewise was unsuccessful in claiming that an unpleasant work assignment (a months-long painting job) was discriminatory. 215 F.3d 703, 712 (7th Cir. 2000). The court rejected this claim because—as here—the plaintiff previously had performed similar tasks; another worker also had done so; and so "the assignment seems to be well within the scope of normal activities for a" worker in the plaintiff's position. *Id.*

4. To reach any other conclusion on the facts of this case would cause untold disruption in innumerable workplaces when an employee has filed an employment discrimination claim, been named as a witness, or otherwise opposed allegedly unlawful discrimination. Such a result would create a federal case out of every management decision to alter the mix of an employee's duties within his or her job description. The already extraordinary number of Title VII retaliation filings would multiply. A construction worker could state a claim if he or she were asked to pour concrete rather than operate a jackhammer; an accountant could complain about be-

ing shifted to do expense control and reimbursement rather than the more prestigious task of preparing financial reports; a landscape laborer could complain about being shifted from the riding mower to the dirtier tasks of mulching, weed control, or grading. A law firm associate might complain that he is now merely writing briefs rather than trying cases, which might be perceived as advantageous to partnership prospects. Of course, it is not just modifications in job duties that would be potentially actionable; the *failure* to give the Title VII complainant tasks that were assigned to others would likewise support a retaliation claim under White's theory of Title VII. This would put the courts in the business of scrutinizing the minutiae of every task assignment to determine whether the duties were appropriately assigned, a task for which the courts are singularly ill-suited. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

Extending Title VII liability in this fashion would mean as a practical matter that a Title VII complainant or witness could not be subject to normal supervision and direction by management. Plaintiffs often argue that retaliatory motive is a matter of jury inference, so if minor job modifications are actionable, any supervisory action that is arguably adverse becomes a basis for litigation. To avoid litigation risk, employers would have little option but to treat with kid gloves any employee involved in any way with a discrimination claim, and to ensure that any modification of duties for such an employee is inarguably neutral or preferential—or to entirely forgo task modifications that the needs of the business require. And, because the standards under 703 and 704 are the same, see *supra* at 16-17, these same untoward effects would mean a monumental, across-the-board expansion of liability.

Such a wasteful result flies in the face of this Court's repeated admonition that Title VII was intended to "maint[ain]

... employer prerogatives." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 242 (1989); *accord Burdine*, 450 U.S. at 259 (Title VII was "not intended to 'diminish traditional management prerogatives'"). As Justice Brennan explained for this Court in *Local Number 93, Int'l Ass'n of Firefighters* v. *Cleveland*:

> Congress was particularly concerned to avoid undue federal interference with managerial discretion.... [T]he liberal Republicans and Southern Democrats whose support was crucial to obtaining passage of [Title VII] expressed misgivings about the potential for Government intrusion into the managerial decisions of employers and unions beyond what was necessary to eradicate unlawful discrimination. Their votes were obtained only after they were given assurances that "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible."

478 U.S. 501, 519-20 (1986) (internal citation omitted); *accord Weber*, 443 U.S. at 206.

To permit suit for a minor modification of job duties within an employee's conceded job description would without doubt "'diminish traditional management prerogatives,'" *Burdine*, 450 U.S. at 259—the assignment of work duties is among the most basic of management prerogatives, and is essential to the efficient functioning of every work place, from construction site to investment bank. An employer cannot function if every minor job modification raises the specter of employment discrimination, and there is nothing in Title VII to suggest that Congress intended such an extraordinary result. This Court should hold fast to the requirement of "an *employer-sanctioned* adverse action *officially changing* her employment status or situation." *Suders*, 542 U.S. at 134 (emphases added). A supervisor's assigning an employee ordinary and essential tasks within her job description that her coworkers routinely perform is not an "unlawful employment practice" of "discriminat[ion]" actionable under section 704.

5. Such a rule does not condone less serious retaliatory acts in the workplace, nor mean that discriminatory task changes and comparable supervisor conduct are necessarily immune under Title VII. Most circuits (including the Sixth Circuit) recognize a claim of retaliatory hostile work environment under section 704 if the retaliation is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (alteration in original).[7] The retaliatory singling out of a Title VII complainant to perform abusive, demeaning or dangerous tasks might (in given circumstances) support the elements of a hostile-work-environment claim. Here, however, White has not alleged that she was assigned to perform abusive or harassing tasks; as noted above, she was assigned the same standard duties that her fellow maintenance-of-way workers typically performed. Moreover, as the Sixth Circuit noted, White did not raise a retaliatory hostile-work-environment claim. Pet. App. 10a n.1. It is under this rubric that allegations of the kind White makes should be analyzed.[8]

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[7] *See* Pet. App. 10a n.1; *Marrero*, 304 F.3d at 26; *Von Gunten*, 243 F.3d at 865; *Ray* v. *Henderson*, 217 F.3d 1234, 1245 (9th Cir. 1997); *Richardson* v. *New York State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999); *Gunnell* v. *Utah Valley State Coll.*, 152 F.3d 1253, 1264-65 (10th Cir. 1998); *Knox* v. *Indiana*, 93 F.3d 1327, 1334-36 (7th Cir. 1996); 2 Lex K. Larson, *Employment Discrimination* § 34.04, at 34-59 to -61 & nn.36-37 (2d ed. 2004).

[8] It is only sensible to apply the hostile-work-environment standard to such claims. The hostile-work-environment standard does attempt to pin liability to specific—often minor—supervisory acts, and is flexible enough to account for the totality of circumstances, including retaliation both in and outside of the workplace. *Meritor*, 477 U.S. at 60, 67 (noting that conduct outside the workplace may contribute to a hostile work environment). And, as opposed to White's theory of Title VII, it would ensure that only retaliation that creates a seriously adverse change in working conditions may subject the employer to liability. Moreover, applying such a standard to lesser retaliatory acts promotes the essential Title VII objective of "cooperation and voluntary compliance." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982). Employers would have the incentive to

D. White's Temporary Removal from Service, Which Was Rescinded with Back Pay, Is Not Actionable.

White also sought to prove that Brown retaliated against her when, as she stated in her EEOC charge, she "was put on suspension pending an investigation" into the supervisor's charge that she had been insubordinate. JA 31; see also *id.* at 17 (in her complaint, referring to a "suspension" pending investigation); *id.* at 35. After investigation, the terminal manager of the Tennessee Yard decided that the removal from service was unwarranted, returned White to service, expunged the charges from her record, and awarded her full back pay for the days she did not work. I Tr. 39; III Tr. 642; JA 62. Even though BNSF promptly investigated and vacated the allegedly retaliatory suspension, the Sixth Circuit nonetheless held that BNSF still is liable to White for the supervisor's erroneous suspension: "*any kind* of adverse action" by a supervisor, even temporary, suffices to create employer liability if it is not trivial in effect. Pet. App. 22a. According to the Sixth Circuit, "[t]aking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, it violates Title VII." *Id.*

A temporary suspension for insubordination that the employer disapproves after prompt investigation (with full back pay) simply cannot be characterized as "an *employer-sanctioned* adverse action *officially changing* her employment status or situation." *Suders*, 542 U.S. at 134 (emphases added). The initial investigatory suspension was not the official decision of the company under the terms of the CBA, and the action that is properly attributable to the company—*viz.*, rescinding the suspension and awarding back pay—did not adversely affect the compensation, terms, conditions or privi-

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develop retaliation-specific corporate policies to prevent initial supervisory retaliatory acts from festering into hostile-work-environment claims, so as to take advantage of the *Ellerth/Faragher* affirmative defense. *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 764-65.

leges of White's employment. To permit liability under such circumstances would be inconsistent with this Court's teachings about corporate liability and its precedents about when a cause of action for discrimination accrues, and would undercut the collective-bargaining process and prevent employers in a wide range of circumstances from exercising normal prerogatives to maintain workplace discipline.

1. Discipline at the Tennessee Yard is governed by Rules 90 and 91 of the CBA negotiated by the railroad and the Brotherhood of Maintenance of Way Employes. *Supra* at 5-6. Significantly, Rule 91 distinguishes between immediate disciplinary action by supervisors and a subsequent "decision of the Carrier" on discipline. It allows a disciplined or dismissed employee to be advised of the charge, and upon receiving it, to "make written request for [an] investigation" of any allegedly unjust or unfair treatment within 15 days. JA 56. At that point, the CBA provides an expedited timetable for an employer decision on discipline. "[A] fair and impartial investigation ... will be held within 15 days" of the request, CBA R. 91(b)(2) (JA 56), and "[*a*] *decision will be rendered by the Carrier* within 10 days after completion of the investigation." *Id.* R. 91(b)(5) (JA 57) (emphasis added). If the company decides that the discipline was unwarranted, the discipline is vacated and the employee is restored to his or her prior position: The charge "shall be stricken from the record," and "[i]f by reason of such unsustained charge the employe[e] has been removed from position held," the employee shall be reinstated with full back pay. CBA R. 91(b)(6) (JA 57).

2. Here, the CBA makes clear that the initial suspension of White pending investigation was "not the official act of the enterprise," *Ellerth*, 524 U.S. at 762, but rather was temporary and tentative. BNSF's "official act" was its "decision" after investigation, pursuant to Rule 91 of the CBA, that White should not be removed from service, CBA R. 91(b)(5), (7) (JA 57), and that the investigatory suspension would be re-

scinded with full back pay.

Any other rule would deny employers the ability to have their senior management make reasoned decisions on employee discipline based on factual investigations. Many employers subject to Title VII operate through complex organizations. Corporate decisionmaking often occurs across multiple levels of hierarchy; important matters such as employee discipline may be decided initially at lower levels of management, and may require subsequent investigation and tiered review by upper management. The "adverse employment action" requires "an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 762. "The supervisor often must obtain the imprimatur of the enterprise and use its internal processes," including senior management review. *Id.* If the supervisor's action officially changing the plaintiff's employment status is effective, then "the supervisor and the employer merge into a single entity." *Id.* But, if the employer rejects and corrects the supervisor's action, it is not a company act that qualifies as an adverse employment action. What is more, the anomalous Sixth Circuit rule would *punish* the employer for correcting the initial action, because the plaintiff undoubtedly will argue to the jury that the withdrawal of the suspension and award of back pay themselves were evidence that the initial action was unjustified and therefore discriminatory.

Consistent with *Ellerth*'s focus on "an official act" of the company, *Suders*, 542 U.S. at 150, courts of appeals repeatedly have denied liability for corrected actions, even though the uncorrected action might have violated Title VII. In *Dobbs-Weinstein* v. *Vanderbilt University* (which the decision below limited to its facts in the course of seeking to distinguish it, see Pet. App. 19a-22a & n.7), the Sixth Circuit considered a professor's claim that a denial of tenure violated Title VII even though the decision subsequently was reversed and full back pay given. 185 F.3d 542, 544 (6th Cir. 1999). The court held that the remedied action did not give rise to

liability. The initial denial of tenure was not "the last word" on the matter, *id.* at 545, and therefore the plaintiff did not "suffer[] a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII," *id.* at 546. The denial of tenure was simply an "interlocutory or mediate decision," *id.* at 545, and recognizing a cause of action under such circumstances would "encourage litigation" at the expense of "internal grievance procedures," *id.* at 546. Other courts hold likewise.[9]

Indeed, it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full back pay to be an "unlawful employment practice," when there would be no relief that could be granted in an equitable action under section 705, 42 U.S.C. § 2000e-5(f) & (g), which for most of the Act's history was the only remedy available. The Sixth Circuit found it significant that White could now seek emotional distress damages after the 1991 amendments, Pet. App. 23a, but the authorization of additional remedies did not alter the scope or meaning of "unlawful employment practices" under section 704. The Sixth Circuit improperly blurs the distinction between what conduct creates liability, and what remedies are available once liability attaches.

3. The Sixth Circuit justified its disregard of BNSF's corrective actions with the assertion that in cases dealing with Title VII's statute of limitations, "[t]he Supreme Court has rejected the argument that the pendency of an internal grievance process renders the employment decision 'tentative' or 'non-final' for purposes of Title VII." Pet. App. 23a. That reasoning misconceives the facts. White's initial suspension

[9] *Accord Taylor* v. *Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003) ("An employer may cure an adverse employment action ... before that action is the subject of litigation."); *Okruhlik* v. *University of Arkansas*, 395 F.3d 872, 879-80 (8th Cir. 2005); *Estades-Negroni* v. *Associates Corp. of N. Am.*, 377 F.3d 58, 63 (1st Cir 2004); *Pennington* v. *City of Huntsville*, 261 F.3d 1262, 1267-68 (11th Cir. 2001); *Brooks* v. *City of San Mateo*, 229 F.3d 917, 929-30 (9th Cir. 2000); *Breaux* v. *City of Garland*, 205 F.3d 150 (5th Cir. 2000).

was always tentative, and was withdrawn as part and parcel of the Carrier's disciplinary "decision" under Rule 91(b)(5). JA 57. Grievances and appeals are governed by a wholly separate provision (Rule 90). *Id.* at 54-56. It is only when an employee is "dissatisfied" with the Carrier's "decision" on discipline that she has the right to pursue an appeal through a Rule 90 grievance. CBA R. 91(b)(7)-(8) (JA 57).

Indeed, this Court's statute of limitations precedents affirmatively support BNSF. This Court has recognized the possibility that a union and employer may "agree[] to a contract under which management's ultimate adoption of a supervisor's recommendation would be deemed the relevant" decision for purposes of the anti-discrimination laws. *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976). Here, labor and management negotiated a collective bargaining agreement by which the employer renders its decision on discipline after initial investigation, with a separate grievance and appeal process available thereafter.

Moreover, in both *Robbins & Myers* and *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), this Court sought to determine when the employer had "established its official position." *Ricks*, 449 U.S. at 261, 262. Importantly, the Court did not simply look to the first decision made by a corporate employee. See *id.* at 252-54, 261-62 & n.17; *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 111 (2002) (in *Robbins & Myers*, "the discriminatory act occurred on ... the date that the parties understood the termination to be final"). Instead, it sought to identify the company's "employment decision." *Ricks*, 449 U.S. at 261; see also *id.* (focusing on "when the employer's decision is made"). Here, for all of the reasons set forth above, BNSF's "official position" was established, and its "employment decision" was made, only when it determined after investigation that White's suspension

should be rescinded.[10]

The result might *arguendo* have been different if the company had upheld the suspension. But it did not, and for that reason the discussion of grievance procedures in *Ricks* and *Robbins & Myers* is beside the point. As the Court explained in *Ricks*, a grievance process "is a *remedy*" for a decision that already has been made; it is a "method of collateral review of an *employment decision*." *Id.* (second emphasis added). But here, the rescission of White's suspension was, by operation of the CBA, itself the "employment decision," and the CBA in this regard is determinative. *International Union*, 429 U.S. at 234. The relevant point in time is "when the employer's decision is made," 449 U.S. at 261, and that decision here caused no adverse change in the compensation, terms, conditions or privileges of White's employment.

Permitting a cause of action under these circumstances would thwart Title VII's stated preference for "conciliation," mediation and "voluntary compliance," *Ellerth*, 524 U.S. at 764; *Ford Motor*, 458 U.S. at 228, and would undermine the primacy of collective bargaining in the unionized workplace. In the CBA that governs here, the union and management negotiated and agreed to a process that, they determined, best serves the collective interests of labor and management. The CBA preserves management's right to order disruptive, insubordinate and noncompliant employees removed from service. The union and management deemed the employee fully protected by the bargained-for procedure, which entitles the employee to an investigation, the right to present witnesses, a Carrier decision on an expedited schedule, and the compre-

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[10] There was testimony that White would have been terminated if she did not formally request an investigation within the 15-day period. III Tr. 553-54. BNSF has no such policy, *see* JA 56-57; *but cf.* Pet. App. 6a (mistakenly asserting same), but even if it did, termination would have been a separate action. The only initial discipline was a suspension pending investigation, and the only company act was the decision not to discipline and to rectify the suspension.

hensive remedies of expunging the employee record, reinstatement, and full back pay. Labor and management agreed on what constitutes the "decision of the Carrier" on discipline, and that "decision" was not adverse to White.

4. The Sixth Circuit's contrary rule, if adopted, would have significant consequences for the normal, safe and efficient operation of businesses around the country. Despite employers' best efforts, inappropriate, unsafe, and even illegal conduct occurs regularly in the American workplace. This includes the use of alcohol and illegal drugs, fighting, stealing, and the violation of work and safety rules. Such behavior threatens employee safety, company property, and the efficient operation of the business—and sometimes public safety.[11] Where railroads are concerned, insubordination—the infraction for which White temporarily was suspended—cannot be countenanced, for it is through clear lines of authority that safety and efficiency are maintained. See *Parrish* v. *Worldwide Travel Serv., Inc.*, 512 S.E.2d 818 (Va. 1999) (insubordination is just cause for termination); Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. Cin. L. Rev. 517, 532 & n.81 (2004); *Dalfort Corp.* v. *International Ass'n of Machinists & Aerospace Workers*, 85 Lab. Arb. (BNA) (June 17, 1985) (upholding suspension for insubordination). For all of these reasons, there must be a zone within which businesses can enforce immediate discipline in the workplace.

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[11] *See, e.g.*, Nat'l Inst. on Alcohol Abuse & Alcoholism of the NIH, *Alcohol Alert, Alcohol and the Workplace* (July 1999), *at* http://pubs.niaaa.nih.gov/publications/aa44.htm ("Drinking among U.S. workers can threaten public safety, impair job performance, and result in costly medical, social, and other problems affecting employees and employers alike. Productivity losses attributed to alcohol were estimated at $119 billion for 1995."). Safety is of paramount concern in the railroad industry because of the potential dangers of heavy equipment moving at high speed, and the industry is governed by elaborate and extensive safety statutes and regulation. *See generally, e.g.*, Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971; 49 C.F.R. pts. 209, 211-214, 217-219.

Suspensions without pay pending investigation are a cornerstone of modern business practice. See Alan M. Koral, *Avoiding Workplace Litigation: When You Write, You May Be Wrong*, 562 PLI/Lit 319, 381 (1997) ("'Suspension pending investigation' is becoming an increasingly popular form of protecting the employer['s] business while it is investigating a possible employee violation."). In many industries such as railroading, employers must be able to remove employees from service immediately. The workplace is decentralized, with mobile work crews often operating far from any centralized base and the scrutiny of a senior executive. It is essential that lower-level line supervisors be able to make immediate interim decisions for the safe operation of the crew—subject to final decisionmaking by the corporate entity. Accordingly, using temporary suspensions pending investigation is necessary and appropriate, and indeed sometimes even mandatory. See 49 C.F.R. § 219.104(a) (requiring railroad to "immediately remove [an] employee from covered service" for alcohol violations); III Tr. 515 (testimony that BNSF employees are immediately removed from service pending investigation for fighting; drugs and alcohol; stealing; and insubordination).

The Sixth Circuit suggests that employers may still suspend employees so long as they do so *with pay*. Pet. App. 24a. But that is no solution at all, because it would systematically and unfairly place employers at substantial economic disadvantage in the usual case when the suspension is legitimate. An employer has no way of knowing prior to an investigation whether a removal from service was based on discrimination prohibited under either section 703 or 704. The Sixth Circuit's rule presents employers with a Hobson's choice. If the suspension is without pay, the employer is automatically liable if discrimination is later found. But if, to avoid liability, the employer must continue to pay a suspended employee for periods when the employee does not work, the employer will have no practical recourse for recovering the money if the suspension is upheld and the employee is ultimately termi-

nated. In many circumstances, employees will have spent their wages and will be effectively judgment-proof. Employers who may only avoid retaliation litigation by paying suspended employees their full, unrecoverable wages for work not performed will be deterred from suspending many employees even if the employee's misconduct clearly warrants the suspension, and even if the suspension is necessary for safety, discipline or efficiency. Nothing in Title VII compels such an aberrant and detrimental result that is contrary to sound business practice.[12]

Furthermore, a temporary suspension without pay that is timely rescinded by senior management is not on the whole unjust to the employee whose suspension was improper and retaliatory. Although in extraordinary cases there may be some hardship during the pendency of the proceeding, a vindicated employee will end up receiving full pay for periods in which, after all, he or she did not have to work and therefore was free to obtain temporary, substitute employment. Indeed, this Court has recognized in other contexts that reinstatement with back pay (and the consequent vindication for the employee) is a substantially comprehensive remedy for improper suspension or dismissal, and that the ordinary incidents of resolving workplace disputes—temporary humiliation and fear of losing a job, and short-term economic difficulties of being without a paycheck—generally must be borne by the employee. *Sampson* v. *Murray*, 415 U.S. 61, 82, 89-90, 92 n.68

[12] The Sixth Circuit gave weight to the fact that the suspension lasted 37 days. Pet. App. 22a. But the length of time it took in this particular case does not determine the general question of whether a rescinded temporary suspension constitutes an "unlawful employment practice" under section 704. Indeed, although not in the record on appeal, the transcript of the investigatory hearing reflects that 11 of the 37 days are attributable to White's own request to postpone the hearing. In any event, the union agreed in the CBA that interests in procedural fairness and decisional accuracy supported a 15-day period of investigation and 10-day period for the Carrier's decision. Plainly, the union and Carrier decided that those interests outweighed any burden on the suspended employee, provided that reinstatement and full back pay would be awarded.

(1974) (noting that absent extraordinary circumstances, "an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual," even though no remedy would be available for such temporary harms under the Back Pay Act). Employers should not be charged with Title VII liability when they correct the initial decisions of lower level supervisors.[13]

II. THE EEOC'S INTERPRETATION OF SECTION 704 TO SUPPORT THE SIXTH CIRCUIT'S RULING IS NOT ENTITLED TO DEFERENCE.

While BNSF clearly prevails under the adverse-employment-action standard as interpreted by this Court, the EEOC has proposed an interpretation of section 704 that cannot be sustained. Specifically, the EEOC interprets section 704(a) to forbid "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." 2 *EEOC Compliance Manual* ¶ 8005, at 6512 (May 20, 1998) (CCH 2005) ("*EEOC 5/98 Manual*"); see *Ray* v. *Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000). This Court should reject the EEOC interpretation.

As a threshold matter, the EEOC's guidelines are entitled to little deference. Congress has not given the EEOC authority to promulgate rules or regulations under Title VII, *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976), and so the

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[13] Because White's damages flowed from the suspension, this Court should remand for a new trial even if it holds that the reassignment of forklift duties was actionable. *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959). The only evidence regarding any injury she allegedly suffered from the latter is her claim that it caused her to cry, 1 Tr. 119-20, which is not the kind of "genuine and serious" anguish that can be compensated as emotional damages. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 157 (2093).

EEOC guidelines "do not receive *Chevron* deference," *Morgan*, 536 U.S. at 110 n.6. Rather, adoption of an EEOC position "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Gilbert*, 429 U.S. at 142 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Gonzalez* v. *Oregon*, No. 04-623, 2006 WL 89200, at *8-*10 (U.S. Jan. 17, 2006). The EEOC's guidance reflects none of these values.

The current EEOC guidelines do not represent a longstanding and "contemporaneous interpretation of Title VII." *Gilbert*, 429 U.S. at 142. Far from it. The EEOC first announced the "reasonably likely to deter" formulation in May 1998 (and in so doing expressly disagreed with the prevailing interpretation of the courts, which have primary responsibility for interpreting Title VII). *Compare* 2 *EEOC 5/98 Manual* ¶ 8005, at 6512 & nn.36-37, *with* 2 *EEOC Compliance Manual* §§ 614.1(d), 614.7 (Jan. 1998); see also *Von Gunten*, 243 F.3d at 863 n.1 (rejecting the EEOC standard). If the eight-year delay in promulgating the regulations at issue in *Gilbert* undercut their persuasive force, the 34-year delay here *a fortiori* does so. See also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (no deference to an EEOC "position [that] was not expressly reflected in its policy guidelines until some 24 years after passage of the statute").

What is more, the May 1998 version of the retaliation guideline conflicts with longstanding EEOC interpretation of section 704(a). In 1984 the EEOC declared that a prima facie case of retaliation "must [be] establish[ed]" "in the same manner" as any claim under section 703. See 2 *EEOC Compliance Manual* § 614.4(a) (July 1984). As late as January 1998, the EEOC continued to state that a prima facie case "can be shown in more or less the same manner as a charge or complaint filed on any other basis under Title VII," 2 *EEOC Compliance Manual* § 614.3(a) (Jan. 1998), and that a com-

plainant need only show "that the respondent took some sort of adverse employment-related action against him," *id.* § 614.1(d); see also 2 *EEOC Compliance Manual* § 614.3(a) (Mar. 1988). The EEOC has proffered "no suggestion that some new source of legislative history ha[s] been discovered," *Gilbert*, 429 U.S. at 145—on the contrary, its newly minted theory was "based on statutory language and policy considerations." 2 *EEOC 5/98 Manual* ¶ 8005, at 6513. This Court discounts unexplained EEOC departures from prior positions. *Arabian Am. Oil Co.*, 499 U.S. at 257 ("[t]he EEOC offers no basis in its experience for the change").

Not only is the current EEOC manual inconsistent with its prior position, but its new interpretation is irreconcilable with Congress's understanding in 1991 when it substantially amended the Civil Rights Act. The adverse-employment-action rubric (which led to the ultimate- and materially adverse-employment-action tests) was by then already well established,[14] and the reasonably-likely-to-deter standard did not arise in the EEOC and Ninth Circuit until years later. Congress made numerous revisions to Title VII in response to disapproved court rulings, see generally H.R. Rep. No. 102-40(I) (1991), but in authorizing damages remedies for section 703 and 704 violations, it is presumed to have ratified the existing judicial understanding of the elements of such a claim. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); see also *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700-01 (1992); *Her-*

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[14] *See* 1 Barbara Lindemann Schlei & Paul Grossman, *Employment Discrimination Law* 534 (2d ed. 1983); *Petitti* v. *New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990); *Sumner* v. *U.S.P.S.*, 899 F.2d 203, 208-09 (2d Cir. 1990); *Williams* v. *Cerberonics*, 871 F.2d 452, 457 (4th Cir. 1989); *Hill* v. *Mississippi State Empl. Serv.*, 918 F.2d 1233, 1241 (5th Cir. 1990); *Canitia* v. *Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990); *Hamann* v. *Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990); *Sherpell* v. *Humnoke Sch. Dist. No. 5*, 874 F.2d 536, 540 (8th Cir. 1989); *Jordan* v. *Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988); *Burrus* v. *United Tel. Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir. 1982); *Bigge* v. *Albertsons, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990).

man & MacLean v. *Huddleston*, 459 U.S. 375, 384-86 (1983).

Even aside from such inconsistencies, the EEOC's newly minted position is bereft of "the power to persuade." *Gilbert*, 429 U.S. at 142. The EEOC justifies its new position not with reference to any new developments, but principally on the basis of the unchanged statutory text. The EEOC asserts that section 704(a) is broader than section 703, on the theory that whereas section 704(a) "make[s] it unlawful 'to discriminate' against an individual because of his or her protected activity," "the general anti-discrimination provisions ... make it unlawful to discriminate with respect to an individual's 'terms, conditions, or privileges of employment.'" 2 *EEOC 5/98 Manual* ¶ 8005, at 6513. Read in absolute terms, the EEOC says, section 704 "prohibits *any* form of discrimination against an individual for opposing discrimination or filing a charge." EEOC CA6 Br. at 4 (emphasis added); 2 *EEOC 5/98 Manual* ¶ 8005, at 6513 ("An interpretation of Title VII that permits some forms of retaliation to go unpunished would ... conflict with the language and purpose of the anti-retaliation provisions.").

The EEOC's wooden focus on isolated statutory phrases has little to recommend it as statutory interpretation. It disregards this Court's rule that "[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole," *Morton*, 467 U.S. at 828; ignores the structural relationship between sections 703 and 704; and gives no content to the textual limitation in section 704 prohibiting only an "employment practice" of "discriminat[ing] against" persons engaged in protected activity. See *supra* at 18-19.

In fact, the EEOC does not follow the absolutist interpretation of section 704 that it claims the statutory language compels: "Notwithstanding the broad language of the anti-retaliation provision, the Commission does not mean to suggest that *every* action taken by an employer could form the basis of a retaliation claim." EEOC CA6 Br. at 9. Thus, it opines, section 704 is impliedly limited to prohibiting only

discrimination "that is reasonably likely to deter protected activity." 2 *EEOC 5/98 Manual* ¶ 8005, at 6512-13. As the court below observed, the EEOC cannot wrap its position in the plain language mantle: "[t]he EEOC does not explain how it justifies excluding such discriminatory acts under its strictly literal reading of the statute, which prohibits discrimination without any explicit textual limitation regarding the type of discrimination or level of severity required." Pet. App. 16a. Rather than adopt the EEOC's stance, this Court should read section 704(a) in harmony with section 703(a), in the manner set forth above. Cf. *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-37 (2002) (interpreting *in pari materia* adjacent statutory provisions that are worded slightly differently, when the terser provision is reasonably interpreted as shorthand for the broader, preceding statutory formulation, and a contrary interpretation would yield odd results).

In all events, the EEOC's "reasonably likely to deter" standard is irreconcilable with the purposes and principled administration of Title VII. *First*, the "expansive" nature of the EEOC's standard, *Pardi* v. *Kaiser Found. Hosp.*, 389 F.3d 840, 850 (9th Cir. 2004), means that the most trivial workplace conduct would become subject to litigation. This is vividly illustrated by the examples the EEOC proffers of how the "reasonably likely to deter" standard operates. The EEOC concludes that a supervisor's one-time retaliatory failure to invite a charging party to lunch with colleagues is not actionable "because it is not reasonably likely to deter protected activity," whereas excluding her from "regular weekly lunches" "could reasonably deter [the charging party] or others from engaging in protected activity," even in the absence of a showing of any change in the terms or conditions of employment or impairment of employment opportunity. 2 *EEOC 5/98 Manual* ¶ 8005, at 6512. The EEOC does not explain how it derives the distinction between occasional and weekly lunches, or why Congress would have countenanced regula-

tion of such trivial actions.[15] Moreover, while the *Ellerth* adverse-employment-action standard requires an act of a supervisor to trigger liability, 524 U.S. at 762, the EEOC standard would broaden section 704 to include claims alleging retaliation by *coworkers* acting within the scope of their employment. 42 U.S.C. § 2000(e)(b) ("employer" includes "any agent"). And any harassment or other employer action that is deemed "reasonably likely to deter" protected activity would be actionable, even though it would not rise to the level of creating a hostile work environment under traditional Title VII principles. 2 *EEOC 5/98 Manual* ¶ 8005, at 6512-13. Section 704 should not be read to open this Pandora's box.[16]

Second, the EEOC's standard is founded on the illogical premise that Congress intended to afford *less* protection to victims of the most hateful forms of discrimination that have historically had the greatest impact on employment—namely, discrimination on the basis of race, color, religion, sex, and national origin—than to persons who are discriminated against solely because of their opposition to certain employer

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[15] Similar examples arise in the Ninth Circuit, the sole court to adopt the EEOC standard. In one case, mere *proposals* to transfer an employee and give him additional supervision—none of which were acted upon—were enough to satisfy the EEOC test. *Moore* v. *California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 847-48 (9th Cir. 2002). In another case, the Ninth Circuit determined that the "reasonably likely to deter" test was satisfied by, among other things, management having coworkers circulate a petition about the plaintiff's conduct, and withholding the "public recognition" that normally accompanied ten years of service. *Coszalter* v. *City of Salem*, 320 F.3d 968, 976-77 (9th Cir. 2003).

[16] A broader standard of liability under section 704 also creates perverse incentives for an employee to generate even questionable claims under section 703 in order to acquire the expanded protections of section 704. Thus, an underperforming employee who is concerned about adverse steps an employer is about to take against her could file a section 703 charge, and then file a retaliation claim. The employer would face substantial section 704 litigation risk even if the section 703 claim were insubstantial in the first instance, and would be deterred by that risk from taking legitimate, good-faith employment actions.

practices. See *supra* at 17. It would be incongruous indeed to conclude that there would be no liability under section 703 for excluding certain racial groups from weekly lunches (because the exclusion does not affect the terms and conditions of employment or employment opportunities), but to impose liability under section 704 to others left off the lunch-guest list simply because they have already filed a Title VII charge. The better explanation, as courts have held, is that Congress intended discrimination under sections 703 and 704 to be measured by the same standard, which looks to the objective nature of the employment action. See *supra at* 16-21.

Third, the EEOC deterrence standard—whether the adverse action is "reasonably likely to deter *the charging party or others* from engaging in protected activity," 2 *EEOC 5/98 Manual* ¶ 8005, at 6512 (emphasis added)—is not susceptible of principled application. Evaluating whether the retaliation would in fact have deterred the filing of an EEOC charge or other protected activity will depend on a *post hoc* hypothetical calculus of whether the costs of the retaliation to the employee would have outweighed the benefits of the protected activity. To the extent the EEOC would abstract from the circumstances of the individual party, and ask whether *any* Title VII charging party or witness (even one with the most marginal stake in the proceeding) would be deterred by the retaliatory conduct, then section 704 becomes a statute without limit.[17] The employer becomes subject to Title VII liability

[17] It is unclear what exactly the amorphous EEOC standard means, which is one more reason counseling against its adoption. The Ninth Circuit, the only court to adopt the EEOC standard, has interpreted it to be "partially subjective" and to take the individual employee's preferences into account. *Vasquez* v. *County of L.A.*, 349 F.3d 634, 646 (9th Cir. 2003) ("Including behavior of the charging party in the standard removes it from the hypothetical 'reasonable employee' approach and makes it more subjective."). A standard that incorporates subjective preferences will lead to inconsistent enforcement; and no employer can know *ex ante* what types of actions may subject it to liability, much less prevent them. *Compare Dollis* v. *Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (denying plaintiff a desk audit is alleged to be an adverse employment action), *with*

for almost all untoward conduct of its agents (regardless of the level of harm, 2 *EEOC 5/98 Manual* ¶ 8005, at 6512), and forced to litigate every claim of such conduct. The EEOC standard thus impermissibly encourages retaliation claims based on trivial workplace dissatisfactions.

Finally, of great practical significance, the EEOC's indeterminate standard would magnify the substantial number of retaliation filings, and the costs that they impose upon employers defending against them. Retaliation filings under Title VII nearly doubled between 1992 and 2004, from approximately 10,000 to approximately 20,000, and now constitute a quarter of all Title VII filings. See EEOC, Charge Statistics FY 1992 Through FY 2004, *at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005). This Court

Harris v. *Secretary, U.S. Dep't of the Army*, 119 F.3d 1313, 1319 (8th Cir. 1997) (giving plaintiff a desk audit is alleged to be retaliatory), *and Martin* v. *Frank*, 788 F. Supp. 821, 824 (D. Del. 1992) (requiring overtime is allegedly retaliatory), *with Patel* v. *Allstate Ins. Co.*, 105 F.3d 365, 373 (7th Cir. 1997) (denying overtime is allegedly discriminatory), *and Deavenport* v. *MCI Tel. Corp.*, 973 F. Supp. 1221, 1227 (D. Col. 1997) (plaintiff complained of being "forced" to travel extensively), *with Lawson* v. *McPherson*, 679 F. Supp. 28, 32 (D.D.C. 1986) (plaintiff complained of being denied travel opportunities). *Cf. Fyfe* v. *Curlee*, 902 F.2d 401, 405 (5th Cir. 1990) (raising the opposite of White's claim—namely, that transfer to an *easier* job is retaliatory).

Alternatively, the EEOC standard might refer to a reasonable person in the charging party's individual circumstances. But such a standard would be arbitrary for a different reason; it would mean that the *weaker* the plaintiff's claim or stake in the Title VII proceeding, the *more likely* it is that the employer's alleged conduct would be found to be actionable retaliation. Thus, a court could find that an African-American manager who has clear evidence that he was denied a promotion to an officer position worth hundreds of thousands of dollars in potential income on account of race would not be deterred from pursuing his Title VII claim because his supervisor stopped inviting him to weekly lunches. On the other hand, parties with weaker section 703 claims, or witnesses with no personal stake in a proceeding, may well be deterred by the exact same conduct, and thus have a claim under section 704. A deterrence standard that accounts for either individual preferences or circumstances simply leads to arbitrary enforcement of the statute.

cannot shield its eyes to the fact that, while true retaliation continues to occur, many retaliation claims are asserted by litigious or distrustful employees who are disposed to see retaliatory animus in post-filing employer conduct. If this Court were to adopt the EEOC's standard, which has no bright lines, and under which nearly every question of deterrent effect and retaliatory motive would be a jury question, "the temptation to litigate would be hard to resist," *Faragher*, 524 U.S. at 805. That temptation would be all the greater given the availability now of not only equitable relief and attorneys' fees, but also compensatory and punitive damages. This Court should adopt a standard that promotes rational administration of the Act, rather than dangling the irresistible carrot of an almost-certain jury trial for almost any post-filing supervisory action.

The EEOC has gone astray. The standard for what constitutes an "unlawful employment practice" of discrimination should depend on the objective nature of the employer's conduct. That standard, under section 704 as under section 703, is whether "an employer-sanctioned adverse action officially changing her employment status or situation" was based on prohibited discrimination. *Suders*, 542 U.S. at 134; *Ellerth*, 724 U.S. at 761.[18] Under that standard, BNSF prevails.

CONCLUSION

The judgment should be reversed.

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[18] If this Court were to adopt the EEOC standard, the proper course would be to remand for a new trial under that standard. *Ellerth*, 524 U.S. at 765-66. First, even a deterrence standard should not be applied to interim acts of corporate agents that the employer corrects, and thus BNSF should have judgment as a matter of law on the suspension issue under any standard. Second, the jury did not find that any of the complained-of conduct was "reasonably likely to deter" White from pursuing her claims.

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STATUTORY APPENDIX

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

* * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * *

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of em-

ployment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular

religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of

the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5. Enforcement provisions

* * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government,

governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over pro-

ceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to

the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * *

42 U.S.C. § 2000e-8. Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such

agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer,

employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing record-keeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority un-

der this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

42 U.S.C. § 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and ap-

propriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by

such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[19]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

[19] So in original.

(16)

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In The Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

In June of 1997, Sheila White was hired to operate the forklift in the Maintenance of Way Department at the Tennessee Yard facility of the Burlington Northern Santa Fe Railroad. Because forklift operator was a new job and there was not a forklift operator classification under the applicable collective bargaining agreement, White was classified as a track laborer. White was the only woman who worked in the department and the only person in the department qualified to operate a forklift.[1]

On September 16, 1997, White filed an internal complaint of sexual harassment and discrimination by her foreman, Bill Joiner.[2] On September 26, 1997, Burlington Northern suspended Joiner for ten days. On the same day, Marvin Brown, the Roadmaster who supervised both White and Joiner, removed White from the position of forklift operator and directed her instead to do only the work of a track laborer. Brown gave a series of conflicting

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[1] One of White's supervisors warned her that the railroad and her fellow workers would not readily accept a woman in the department. III Tr. 477 ("I mean I think I may have told her that the railroad, you know, that they're not really particularly crazy about women working, especially in this department, you know, and I told her, I said, you know, they may, you know, pick on you or even try to, you know, get you out. . . ."), 480-81 ("If you got guys that has been on the job for 25 – 20, 25, 30 years and have never worked with a woman a day in their life . . . – not saying that they was discriminating, but because of the fact that a woman had never worked there . . . and a lot of guys just didn't know how to accept that and, for one, didn't even know how to deal with a woman, I mean, you know, they know how to deal with their wives at home, but they didn't know how to deal with the fact of actually now working with a woman because a woman had never worked there before.")

[2] The harassment included "discussion of her period in front of male co-workers, daily reminders of her foreman's belief that she should not be in her present job position because she is a woman, a request that she shine a flashlight upon a man while urinating, [and] bathroom facilities that did not adequately protect her expectation of privacy." (JA 46).

explanations for this decision, which the jury concluded had been taken to punish White for complaining about sexual harassment.[3]

Witnesses for both plaintiff[4] and defendant[5] agreed that the work White was thereafter required to do as a track laborer was far less desirable than her duties as a forklift operator. The district judge noted that there was

> lots of testimony from lots of people that [track laborer work] was a lot more strenuous, that it . . . required much more exertion, that it was a lot dirtier, that it frankly almost looks like a different job from being a forklift driver, except that it wasn't a different classification.[6]

"[T]rack laborers must carry heavy objects (e.g., heavy, cumbersome jacks that weigh approximately 110 pounds.)" (JA 49). "Some of the dirty aspects of the job include 'picking up tools, oiling them from down on the ground where sometimes it require[d] you to get on your knees and hands'. . . . Adverse aspects also included prolonged sun exposure." (Pet. App. 107a). The track laborers themselves characterized the forklift job as a more desirable and "easier" position.[7] White testified that she had not been required to work on the railroad tracks while she was assigned to operate the forklift.[8] In denying the company's motion for judgment as a matter of law, the trial judge concluded

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[3] Brief in Opposition, 4-5; Pet. App. 6a.

[4] I Tr. 127-28.

[5] II Tr. 406-08; III Tr. 521, 534, 617.

[6] III Tr. 701; *see* Pet. App. 4a, 25a, 106a-107a, 118a.

[7] II Tr. 406; III Tr. 534, 617.

[8] I Tr. 86-87 (describing duties as a forklift operator), 119 ("[prior to the reassignment] all I knew was forklift. I never experienced working on the railroad tracks. I didn't have any knowledge of working on the railroad tracks.")

> that the tremendous variation of assignments within the job classification means that we can't just look at the job classification to determine whether or not there was a change for her – in the conditions of her employment, and we can look at exactly what she was doing and not doing. . . . [The] pretty graphic distinctions within the range of assignments available and the fact that she went from, no question, an easy job to, I think without much doubt, the most difficult and dirtiest job within the range of jobs available in that classification [are] enough to allow this to go to the jury.[9]

On December 4, 1997, White filed a charge with EEOC alleging that Burlington Northern (and Roadmaster Brown in particular) had retaliated against her and had discriminated against her because of her gender. (JA 30). On December 11, 1997, Brown directed that White be "remove[d] from service."[10] The local General Chairman of the union that represented White testified that this decision meant White was dismissed.[11] Exercising her rights under the applicable collective bargaining agreement, White requested that this dismissal be reviewed at a hearing before a company official.[12] That hearing was held on January 6, 1998; White was represented by the union General Chairman, who called several witnesses on her behalf. On January 16, 1998, the company rescinded the dismissal, reinstated White and directed that she be awarded back pay for the period of time she was out of work. (JA 62).

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[9] III Tr. 703-04.

[10] I Tr. 153; IV Tr. 747; Pet. App. 5a.

[11] II Tr. 337 ("dismissed"), 348 ("discharged"), 355 ("dismissed.")

[12] JA 56. Under the local practice this hearing is referred to as a "formal investigation." III Tr. 498, 510.

White offered substantial evidence as to the injury caused by the loss of her job during this period.[13] While White's appeal was pending, she

> was without a job and without income and she did not know if or when she would be allowed to return to work. During this period, White sought medical treatment for emotional distress and incurred medical expenses.

(Pet. App. 7a; *see id.* at 22a, 23a, 111a, 119a). In denying the company's motion for judgment as a matter of law, the trial judge explained:

> Did she get everything back if somebody retaliated against her based on protected activity? Absolutely not. She had Christmas without – I mean do I have to really recite the record? I mean she had Christmas without income, without a job, with total insecurity. She was depressed. Her daughter . . . says her mom was lethargic, just hardly the same person as she had been in the summer. So, you know, money is often the least of the damage inflicted in these types of cases. . . .[14]

White brought suit under section 704(a) of Title VII, alleging that the September 1997 reassignment and the December 1997 removal from service were motivated by an intent to retaliate against her for complaining about sexual harassment and for filing a charge with EEOC. The jury concluded that Burlington Northern had unlawfully

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[13] I Tr. 154 ("[I]t affected me and my children, because it was the holiday time. That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. And I got very deep – I got very depressed because I didn't have no – I couldn't even have a Christmas dinner, a meal, and so like I said, I had – I was anxious, couldn't sleep at all, and I was just destroyed, I was just upset about the whole thing, no income coming in or anything.")

[14] III Tr. 706.

retaliated against White; it awarded $40,000 in compensatory damages and $3,250 for medical expenses.

SUMMARY OF ARGUMENT

I. The literal language of section 704(a) prohibits *any* action taken against an employee because he or she engaged in protected activity. Section 704(a) of Title VII forbids an employer to "discriminate against" an employee for that reason. Both "discriminate" and "against" are unambiguous terms. "To discriminate is to make a distinction, to make a difference in treatment or favor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (*quoting* Floor Manager's Interpretive Memorandum, 110 Cong. Rec. 7213 (1964)). A retaliatory action is "against" an employee if it is unfavorable or adverse to the interests of that worker.

Petitioner and several amici urge this Court to add to the express requirements of section 704(a) an additional element, requiring proof that the retaliatory act not only constituted discrimination against the victim, but also that the retaliatory act was (or led to consequences that were) "materially adverse" or a "significant change in employment status." But when Congress wished to impose a limitation on the broad prohibitions of Title VII, it did so expressly. There are eleven such express statutory exceptions in Title VII. The courts have no authority to add a twelfth.

Section 704(a) serves the essential purpose of "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The effective functioning of those mechanisms – the EEOC, state anti-discrimination agencies, and federal and state courts – requires that employees who wish to file charges or complaints, to speak with government investigators, or to testify at hearings or trials be "completely free from coercion." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). Even comparatively minor retaliatory acts could significantly impede disclosure or

investigation of very serious discriminatory practices. The EEOC long ago properly concluded that "every instance of unremedied retaliation against persons who engage in Section 704(a) opposition . . . has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination." EEOC Compliance Manual (CCH) § 491.2 (1975). The anti-retaliation provisions of the NLRA, on which Title VII was modeled in 1964, had by then a well-established interpretation forbidding any adverse change in work assignments.

A complete ban on retaliatory practices is particularly important where, as here, a plaintiff has been retaliated against for complaining about sexual harassment. Under *Ellerth v. Burlington Industries*, 524 U.S. 742 (1998), a sexual harassment victim may be unable to obtain redress for such harassment if he "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765. If, as petitioner contends, it is *lawful* to retaliate against women who complain about sexual harassment, so long as the retaliation does not cause a "significant change in employment status," a prudent employee might reasonably conclude that it would be unwise to report instances of harassment. If this Court upholds as lawful the retaliatory measures taken against White, it would be entirely reasonable for any Burlington Northern employee to fear the consequences of complaining about harassment.

Ellerth does not limit the scope of section 704(a). With regard to section 703, *Ellerth* does not hold that it is legal for an employer to discriminate against workers on the basis of race, color, national origin, religion or gender so long as that discrimination falls short of causing a "significant change in employment status." The issue in *Ellerth* was not what discriminatory practices are forbidden by section 703, but when prohibited discrimination (including harassment) can fairly be said to be the action of an employer. Under established agency principles, which *Ellerth* undertook to apply, not modify, an employer is

liable in any case in which the official who engaged in the unlawful discrimination was "aided in" that violation by his or her official authority. The retaliatory actions in this case – assigning White to track work and then ending her employment – could only have been taken by a company supervisor using such official authority.

We urge this Court to apply section 704(a), as written, to forbid any retaliatory act taken against an employee who engaged in protected activity. The EEOC favors a somewhat narrower interpretation, construing section 704(a) to forbid only retaliatory acts that are "reasonably likely to deter a charging party or others from engaging in protected activity." EEOC Compliance Manual § 8, par. 8008 (1998). This EEOC interpretation is consistent with the purpose of section 704(a), and has not proven difficult to administer during the six years it has been applied in the Ninth Circuit. White would prevail under the EEOC interpretation of section 704(a).

II. An employer cannot "cure" a violation of section 704(a) by providing the employee with partial relief. An employee wrongfully dismissed in violation of section 704(a) is entitled to reinstatement, back pay, and (on the appropriate showing) compensatory and punitive damages. An employer cannot, by providing some of this relief (here reinstatement and back pay), obtain immunity from the other relief provided by Title VII. The action of an employer in providing such relief, however, may support the efforts of the employer to establish a defense to punitive damages to the extent that it may show that the retaliation was "contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 546 (1999).

III. Where, as here, a company official has unlawfully used his authority to end a worker's employment, agency principles dictate that the employer is legally responsible for that violation of section 704(a). Petitioner's contention that that unlawful action was an "interim" one – in the sense that the employer assertedly intended at a

later time to reconsider that initial action – does not affect Burlington Northern's legal responsibility for that unlawful initial action.

ARGUMENT

I. SECTION 704(a) FORBIDS *ANY* DISCRIMINATION AGAINST EMPLOYEES WHO ENGAGE IN PROTECTED ACTIVITY

A. THE TEXT OF SECTION 704(a) FORBIDS ALL ACTIONS BY AN EMPLOYER TAKEN AGAINST AN EMPLOYEE BECAUSE HE OR SHE ENGAGED IN PROTECTED ACTIVITY

(1) The Text of Section 704(a) Requires Only That The Retaliatory Action Be "Against" The Employee Who Engaged in Protected Activity

Section 704(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or participated in any manner in an investigation, proceeding, or hearing under this title.

This provision on its face has six distinct elements: (1) the plaintiff must be an "employee," (2) the defendant must be an "employer," (3) the plaintiff must have engaged in a form of protected activity, (4) the employer must be legally responsible for the discrimination complained of, (5) the employer must have engaged in "discriminat[ion] . . . because" of that protected activity, and (6) the action complained of must be "against" the plaintiff.

Petitioner does not contend that any of these six statutory elements was not established, or that any of the

terms of section 704(a) is somehow ambiguous. In the instant case there is no dispute that at the relevant time White was an "employee," and Burlington Northern was an "employer," and White had engaged in protected activity. Burlington Northern does not deny that it was legally responsible for the decision to alter White's job duties. The meaning of "discriminate" is well-established. "To discriminate is to make a distinction, to make a difference in treatment or favor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (*quoting* Floor Manager's Interpretive Memorandum, 110 Cong. Rec. 7213 (1964)).[15] The jury found that Burlington Northern officials had acted with such a discriminatory motive, and the company does not in this Court challenge the correctness of that finding of fact.

Finally, the action complained of must also be "against" the plaintiff. A retaliatory act is "against" an employee if that action is unfavorable to the interests of the plaintiff. In the instant case, the jury concluded that the retaliatory actions had caused $43,250 in damages. The correctness of that finding of fact was not disputed in the courts below.

The question presented is whether, in addition to the six expressly stated elements of a claim under section 704(a), there is an unstated *seventh* requirement. Petitioner urges that there is just such a seventh element, a requirement that a plaintiff must also show that the retaliatory act taken against her resulted in a "significant change in employment status."

This proposal that the courts fashion such an additional requirement for a section 704(a) claim cannot be reconciled with the actual language of section 704(a).

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[15] The Interpretative Memorandum issued by Title VII's floor managers stated more fully that "the concept of discrimination . . . is clear and simply has no hidden meanings. To discriminate is to make a distinction in treatment or favor." 110 Cong. Rec. 7213 (1964).

Section 704(a) is quite specific in spelling out the elements which must be established to make out a section 704(a) claim. Courts are no more at liberty to add to that list than they would be to dispense with one of the statutory requirements. The text of section 704(a) addresses quite specifically the issue raised by petitioner's brief – the type of impact which a retaliatory act must have on the plaintiff in order to support a section 704 claim. What the statute requires – all that the statute requires – is that the retaliatory act be "against" the plaintiff.

The suggestion that the courts fashion some additional limitation on the statutory elements of a section 704(a) claim is inconsistent with the considerable precision with which Title VII as a whole is written. The prohibitions in section 703 and 704 take the form of definitions of several "unlawful employment practice[s]." Section 703 delineates a number of prohibitions involving discrimination on the basis of race, color, national origin, sex and religion; section 704, in addition to forbidding retaliation, bars certain discriminatory advertisements. Congress circumscribed the Title VII prohibitions with eleven specific statutory exceptions. Ten of the exceptions are expressly applicable only to claims under section 703. Section 703(h), for example, exempts from the prohibition against sex discrimination practices that are lawful under the Equal Pay Act. Section 703(e)(1) permits distinctions based on gender, religion or national origin which constitute a bona fide occupational qualification.[16] Only a single

[16] In addition, section 702(a) exempts employment of individuals of a particular religion by a religious institution. Section 703(e)(2) exempts employment of individuals of a particular religion by certain educational institutions affiliated with religious organizations or which have a religious curriculum. Section 703(i) exempts preferential treatment by certain employers of Native Americans. Section 701(k) exempts certain abortion-related benefits from the scope of the prohibition against gender discrimination. Section 703(h) exempts certain bona fide seniority systems. The same section exempts certain ability tests. Section 703(k)(1)(A)(i) delineates the practices which can be utilized

(Continued on following page)

exception applies to practices otherwise forbidden by section 704(a); section 702(b) provides that the requirements of Title VII do not apply where they would compel an employer, union, or other entity to violate the laws of a foreign country where the workplace is located. The content and application of these eleven express statutory exceptions reflect a highly specific and exhaustive delineation of the circumstances in which Congress thought it appropriate to limit the literal reach of the various prohibitions of sections 703 and 704.

When Congress has wanted to limit the types of retaliatory acts forbidden by a statute, and thus implicitly to permit other forms of retaliation, it has done so expressly. Section 1587 of Title 10, for example, protects certain civilian employees within the Department of Defense only from a retaliatory "personnel action." The statute includes a specific definition of a "personnel action" under section 1587. 10 U.S.C. § 1587(a)(3). But section 704(a) emphatically is not framed in the narrower terms of section 1587. Petitioner contends that section 704(a) only forbids those retaliatory acts that are "materially adverse" or "significantly adverse," or involve a "significant change" in a plaintiff's "employment status." But although Congress has utilized just such phrases in numerous other statutes, none of these limiting phrases is to be found in text of section 704(a).

Petitioner asserts that an additional element of a section 704(a) claim is contained in the phrase "unlawful *employment* action." (Pet. Br. 45). That phrase, petitioner urges, requires that a plaintiff prove that the retaliatory act "negatively affect the employment of employees." (Pet. Br. 18) (Emphasis omitted). It is unclear how this assertion, even if correct, would help petitioner; the actions

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despite their discriminatory effect. Section 703(k)(3) exempts from the bar on practices with a discriminatory impact certain prohibitions against the employment of individuals using illegal drugs.

complained of clearly concerned White's employment, and the jury in awarding substantial damages necessarily determined that the effect of those actions was negative. In any event, section 704(a) does not require an "employment action."[17] As used in Title VII, "unlawful employment action" is not an element of a claim under section 704(a) or, indeed, under any provision of section 703. Rather, "unlawful employment action" is the catchall phrase for all conduct forbidden by Title VII, a phrase whose various meanings are *defined* by the various subsections of Title VII. The use of this phrase no more contains an additional requirement of "employment of employees" than it does a suggestion that any provision of Title VII forbids only "action," as opposed to deliberate *in*action (e.g., a failure to promote). Many of the provisions of Title VII clearly apply to things other than the "employment of employees." For example, section 703(c) forbids unions to exclude individuals from membership on an impermissible basis, a prohibition unrelated to whether those members have jobs.

If section 704(a) applied only to workplace retaliation, a wide variety of highly effective non-workplace retaliatory measures could lawfully be used to suppress opposition to discrimination or cooperation with federal or state authorities. Such an interpretation of section 704(a) would be inconsistent with the decision of this Court in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), that section 704(a) prohibits retaliation against former employees by denying them recommendations. The United States correctly advised this Court of the danger of non-workplace retaliation.

> [T]he lower courts have recognized that post-employment retaliation for filing a discrimination charge can take many forms, all of which can seriously chill employees' willingness to

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[17] *Rochon v. Gonzales*, 2006 WL 463116 *6 (D.C.Cir. 2006) (opinion by Ginsburg, J.); *Washington v. Illinois Department of Revenue*, 420 U.S. F.3d 658, 659-60 (7th Cir. 2005).

> complain to or cooperate with the EEOC, and can therefore impair the EEOC's ability to investigate and prevent discrimination.[18]

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983), this Court recognized, for example, that the prosecution of a non-meritorious lawsuit "may be used by an employer as a powerful instrument of coercion or retaliation."

(2) Section 704(a) Does Not Contain and Is Not Subject To The "Terms" and "Conditions" Element of a Section 703(a)(2) Claim

Petitioner argues that the prohibition in section 704(a) is limited to retaliation affecting a "terms [or] conditions . . . of employment," a phrase included not in section 704(a) but only in section 703(a)(2). As we explain below,[19] plaintiff would prevail in this case even if it involved discrimination on the basis of gender (governed by section 703) rather than unlawful retaliation (governed by section 704(a)). But the very different language of sections 703 and 704(a) makes clear that they should be construed independently.

The express terms of sections 703 and 704(a) are decidedly different. First, as explained above, Title VII contains nine different exceptions which expressly apply only to (some or all of) the unlawful employment practices forbidden by section 703, and do not affect claims under section 704. In this regard section 704(a) is expressly *broader* than section 703. Under the section 702(a) exception for religious organizations, for example, a church

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[18] Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), No. 95-1376, 20 n.10.

We set forth in an appendix to this brief a list of cases involving non-workplace retaliation.

[19] *See* pp. 28-33, *infra*.

could decide to dismiss an employee because she was an atheist, but it could not dismiss even an atheist because she complained about sexual harassment.

On the other hand, in other respects section 704(a) is expressly *narrower* than section 703. Section 703 forbids a number of types of discriminatory practices that are not unlawful under section 704(a). Section 703, for example, forbids certain practices that have "a disparate impact on the basis of race, color, religion, sex or national origin" (42 U.S.C. § 2000e-2(k)(1)(A)); nothing in section 704(a) forbids practices, adopted and applied without any retaliatory purpose, that have a disparate impact on workers who engage in protected activities. Unlike section 703, which generally forbids any distinctions for or against individuals on the basis of race, national origin, sex or religion, section 704(a) forbids only distinctions against (but not in favor of) those who engage in protected activities. It would be unlawful under section 703 to give bonuses to employees who convert to a particular religious faith, but quite permissible under section 704(a) to give bonuses to workers who report sexual harassment.

Petitioner's proposal to conform the interpretation of section 704(a) to the meaning of section 703 is further confounded by the fact that section 703 itself has nine different prohibitions, with widely divergent language.[20] Of the nine prohibitions of section 703 itself, only one – section 703(a)(1) – refers to discrimination in the terms and conditions of employment. To the extent (if any) that

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[20] 42 U.S.C. § 2000e-2(a)(1) (discrimination by employer with respect to compensation, terms, conditions, or privileges of employment), 2000e-2(a)(2) (other practices by employer), 2000e-2(b) (discrimination by employment agency), 2000e-2(c)(1) (discrimination by union with regard to membership), 2000e-2(c)(2) (other practices by union), 2000e-2(c)(3) (union actions causing employer to discriminate), 2000e-2(d) (discrimination in apprenticeship and training programs), 20003-2(k) (practices with a disparate impact), 2000e-2(l) (alteration of test scores).

inclusion of the words "terms" and "conditions" in section 703(a)(1) carries with it some sort of limitation on the practices forbidden by that provision (a question this Court need not decide), the deliberate absence of that very limiting language from the remaining eight provisions of section 703, and from section 704(a), reflects an affirmative congressional decision to impose no such restrictions on those other prohibitions of Title VII.[21] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

It is not the least illogical that section 704(a) may at times forbid types of practices that might be lawful under section 703. "Minor" acts of actual or threatened retaliation, by deterring testimony, charges, or other opposition activities, could permit an employer or other defendant to engage with impunity in major violations of section 703. A retaliatory act against a single employee may deter numerous other employees from complaining about a widespread problem of sexual harassment, or keep from the government information which would lead to far reaching changes in the employer's practices. Assignment to less desirable work would not be sufficient by itself to create (although it could well would contribute to) a hostile work environment forbidden by section 703, but a threat to so reassign any worker who complained about sexual harassment could well deter such complaints and thus seriously damage compliance with Title VII. It is entirely understandable that Congress would have chosen to make a "federal case" out of even minor acts of retaliation,

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[21] Petitioner also argues that the phrase "discriminate against" in section 704(a) is also found in section 703; but four of the prohibitions in section 703 do not use even this terminology. Sections 703(a)(2), 703(c)(2), 703(k), and 703(l).

because those actions can obstruct the enforcement and implementation of *federal* law.

Other federal statutes expressly treat actions which interfere with the enforcement of federal law as more serious than the law whose enforcement is at issue. Title 18 imposes severe penalties for actions which interfere with compliance proceedings: up to five years for obstruction of justice (18 U.S.C. § 1505), up to 10 years for reprisals against a witness or informant (18 U.S.C. § 1513(e)) or for witness tampering (18 U.S.C. § 1512(b)), and up to 20 years for the destruction of evidence (18 U.S.C. § 1512(c)). Those penalties are applicable even in criminal cases in which the maximum penalty for the underlying offense was significantly lower.[22] An employer which retaliated in certain ways against a witness in a Title VII trial would be guilty of a felony, even though violation of Title VII itself is not even a misdemeanor.

(3) Other Provisions of Title VII Restrict Comparatively Minor Section 704(a) Claims

Section 704(a) does not exempt from the statutory prohibition a class of retaliatory acts with comparatively minor significance or harm. But other express provisions of Title VII do in practice preclude the imposition of liability for many relatively minor allegedly retaliatory acts, and even reduce the likelihood that such claims will be brought at all.

First, section 701(b) makes clear that a plaintiff alleging unlawful retaliation must establish, under traditional agency principles, that the retaliation complained of

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[22] The maximum penalty for assault not involving a dangerous weapon is six months (18 U.S.C. § 113(a)(4)), but if a perpetrator assaulted the victim in the same way because he or she had testified at trial, the maximum penalty for that retaliatory assault would be ten years (18 U.S.C. § 1513(b)).

can fairly be attributed to the employer. *Burlington Industries v. Ellerth*, 524 U.S. 742, 754 (1998). The most serious acts of retaliation (such as a dismissal, suspension or reassignment) usually involve an express use of agency power; an employer is necessarily liable for such utilization of official authority. *See Ellerth*, 524 U.S. at 758-60. On the other hand, many of the less serious retaliatory acts, such as hostile remarks, dirty looks, ostracism, or the denial of lunch invitations, do not involve any use of official power, even if engaged in by a supervisor. In the absence of such an official use of company authority, a plaintiff ordinarily[23] could not hold an employer liable for a retaliatory act unless he or she could show that the disputed action was motivated by a desire to further the interests of an employer. *Ellerth*, 524 U.S. at 756. Many unofficial retaliatory acts, however, may be motivated only by personal pique that a popular supervisor or fellow employee faced discipline for sexual harassment or other discrimination. Actions taken with such a personal motive are outside the scope of employment. *Ellerth*, 524 U.S. at 756-57. In the instant case, however, there is no dispute that removing White from her work on the forklift and assigning her to work on the tracks required an exercise of official authority.

Second, section 704(a) requires a plaintiff to establish that an allegedly retaliatory action was "against" him or her. The standard is an objective one. The official (or officials) who took the action complained of must have known, or had reason to know, that that action was adverse to the interests of the plaintiff. That is unlikely to be in dispute where, for example, an employer has denied a worker a promotion, a raise or a bonus. On the other hand, if some employment action, such as a minor shift in duties, is truly trivial, the responsible official may well have no

[23] An employer would be liable for a hostile environment under the various circumstances described in *Ellerth* and *Faragher*.

reason to know that the affected employee would care one way or the other. Certainly an employer could not be said to have acted "against" an employee if it gave that worker what was objectively a promotion, unaware that the employee in question preferred his or her existing less well-paid or prestigious position. But an employer would be liable for "pouncing on employees' . . . vulnerabilities . . . seeking out devices that would be harmless to most people but would do real damage to selected targets." *Washington v. Illinois Department of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005). In the instant case, company officials themselves testified that track labor work was far less desirable than operating a forklift; removing White from her job and taking her off the payroll was obviously action taken "against" respondent.

Third, an employee seeking monetary relief must establish that he or she was injured. That will, of course, be obvious if the action complained of caused economic injury, such as a reduction in pay. Section 1981a(a)(1) also authorizes an award of "compensatory damages," but only on proof that the plaintiff actually sustained some "damag[e]." If the action complained of was trifling, a plaintiff's claim to damages, even for emotional distress, may well be insubstantial. Summary judgment would be appropriate regarding damages (and, if that were the only relief sought, on the entire claim) if no reasonable jury could find that a plaintiff had sustained compensable injury. In this case, however, petitioner has never questioned the sufficiency of the evidence to support the jury's finding that the proven retaliatory actions had caused White $40,000 in damages and $3,250 in medical bills.

As a practical matter, these three provisions mean that employees with only minor, non-economic claims will often, and not inappropriately, have difficulty retaining an attorney to litigate such claims. Few if any Title VII plaintiffs have the funds to pay an attorney on an hourly basis. Section 706(k) only provides for awards of counsel fees to a "prevailing" plaintiff. A prudent attorney will be less likely to agree to handle a case with a greater risk of

failure on the merits. A potential case involving only a comparatively minor retaliatory act runs just such a high risk of failure. Such a case may be rejected (at trial or on summary judgment) because the plaintiff cannot show the action complained of was objectively "against" him or her, or was an act for which the employer is liable under agency principles. If a plaintiff has no claim for backpay, and any arguable other injury was slight, there would be a significant likelihood that the plaintiff would not prevail because the trier of fact concluded that the acts complained of caused no harm. No harm, no fee. Few attorneys would even consider taking a case alleging only that the plaintiff had suffered a dirty look, rude remark, or exclusion from a luncheon because of the high probability that they would never be paid for their legal services. This inescapable economic reality, like Adam Smith's unseen hand, will often weed out insubstantial cases, without imposing on the courts the burden of developing and applying some classification scheme for separating minor and non-minor cases.

B. NEITHER THE PURPOSE NOR THE LEGISLATIVE BACKGROUND OF SECTION 704(a) WARRANTS DISREGARDING THE LANGUAGE OF THE TEXT

"If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must be regarded as conclusive.'" *Russello v. United States*, 464 U.S. 16, 20 (1983). In this instance, the purpose and legislative history background of section 704(a) are entirely consistent with a literal reading of that provision.

(1) The Purpose of Section 704(a)

Section 704(a) serves the same essential purpose as most if not all anti-retaliation provisions: "Maintaining unfettered access to statutory remedial mechanisms. Cf.

NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972)." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The anti-retaliation provisions of the National Labor Relations Act, like section 704(a), forbid an employer to "discriminate against" an employee because he or she engaged in protected activity. 29 U.S.C. § 158. This Court's description in *Scrivener* of the purpose of the NLRA anti-retaliation provisions is apposite here.

> "Congress has made it clear that it wishes all persons with information about [unlawful] practices to be *completely free* from coercion against reporting them to the Board. . . ." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). This *complete freedom* is necessary, it has been said, "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB*, 89 U.S.App. D.C. 261, 263, 191 F.2d 483, 485 (1952).

405 U.S. at 121-22 (emphasis added). Congress did not seek to secure compliance with these or most other federal statutes through continuing detailed federal monitoring and supervision.

> Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960).

Section 704(a) of Title VII is but one example of the scores of anti-retaliation provisions that have been adopted by Congress. These provisions play an indispensable role in the enforcement of federal law. Most of the United States Code addresses the activities of corporations and other private and public institutions. When those entities or their officials violate federal law, the violations

are often known only (or at least first) to the individuals who are employees of the very entities or subordinates of the very officials who have broken the law. Law breakers obviously have a powerful incentive to use their power as employers to pressure potential whistle blowing employees to withhold that information. Federal anti-retaliation statutes, by forbidding reprisals against employees who report violations of the law to federal authorities, assure that the national government will have access to that essential information and testimony.[24]

In many of these statutes, including section 704(a), Congress has extended the same protection to employees who report misconduct to higher officials within their own institutions, thus facilitating voluntary compliance with the law. Those salutary provisions have long played a critical role in bringing about compliance with a wide range of federal laws. As one prominent federal official recently observed regarding the importance of laws forbidding retaliation against employees of the federal government itself, "employees have used statutory procedures – including internal channels at their agencies – on countless occasions to correct abuses without risk of retribution."[25]

Forty-three federal statutes,[26] like section 704, provide that an employer may not "discriminate against" workers who disclose to federal officials (and in some instances to supervisors or others) violations of particular federal statutes. These similarly worded provisions facilitate the enforcement of a wide range of federal laws. Federal anti-retaliation statutes using that terminology, for example, protect employees who disclose to the federal government unlawful practices that pose a threat to safety to workers

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[24] *See* Brief for the United States as Amicus Curiae, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), No. 02-1672, 13-14.

[25] Porter Goss, "Loose Lips Sink Spies," New York Times, Feb. 10, 2006, p. A27 col. 1.

[26] A list of these statutes is set forth in an appendix to this brief.

in mines or other workplaces, or to the safety of the public on airplanes, boats, automobiles or railroads. Employees at plants which process nuclear fuel or weapons are protected against "discriminat[ion]" if they reveal safety or security problems to federal officials. Similarly phrased anti-retaliation provisions are found throughout the nation's environmental protection statutes. Federal laws protecting investors are safeguarded by anti-retaliation provisions in federal banking and securities laws, including the Sarbanes-Oxley Act adopted after the collapse of the Enron corporation. Taxpayers are protected by anti-retaliation laws which bar reprisals against workers who disclose fraud or false claims by federal contractors.

Virtually all of these statutes, like section 704(a), provide – without limitation as to the type of retaliatory act – that an employer may not "discriminate against" an employee who engages in protected activities. If a flight attendant recognized that the pilot was drunk, if a mine worker knew that safety equipment was defective or missing, if an airplane mechanic realized that required maintenance was not being performed, if a worker at a nuclear weapons plant noticed violations of security precautions, Congress wanted those employees to be confident that they could without risk of reprisal – any reprisal – report those problems to their superiors or to the federal government. Section 704(a) of Title VII should be construed in the same manner as these other anti-retaliation statutes, which have the same salutary purpose and which also forbid employers to "discriminate against" workers who engage in protected activities.

A literal reading[27] of section 704(a) is consistent with the intent of Congress that employees who engage in

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[27] The Department of Labor, in publications widely distributed and available on its website, has repeatedly assured workers that the numerous anti-retaliation provisions which the Department enforces forbid *all* acts of retaliation. "OSHA Workers' Page" (http://www.osha.gov/as/opa/worker/index.html) ("You cannot be transferred, denied a

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protected activities enjoy "complete freedom" from retaliation. *NLRB v. Scrivener*, 405 U.S. at 122. Any retaliatory act has the potential to deter protected activities. The EEOC long ago concluded that as a practical matter "*[e]very* instance of unremedied retaliation against persons who engage in Section 704(a) opposition . . . has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination."[28] Once an employer has evidenced animosity toward those who engage in protected activities and a willingness to act on that animus, no employee could have confidence that subsequent retaliatory acts would not be more serious.

Protection from retaliation is of particular importance in cases of sexual (or other) harassment violating Title VII. Under *Ellerth v. Burlington Industries*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), an employer is vicariously liable for harassment by a supervisor, subject in some situations to a specific affirmative defense. In order to establish that defense, an employer must demonstrate inter alia "that the plaintiff employee unreasonably failed to take advantage of any

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raise, have your hours reduced, be fired, or punished *in any other way* because you exercised any right) (emphasis added); "The Whistleblower Program" (http://www.osha.gov/dep/oia/whistleblower/index.html) ("the Act prohibits any person from discharging or *in any other manner* discriminating against any employee because the employee has exercised rights under the Act") (emphasis added); "Whistleblowers and Corporate Fraud" ("your employer may *not* discharge or *in any manner* discriminate against you because you provided information . . . or assisted in an investigation") (Sarbanes-Oxley Act) (second emphasis added); "Protecting Whistleblowers" ("*Any* adverse action that results *directly* from your efforts to improve safety and health on the job or the environment is considered discrimination") (first emphasis added); "Rights of Trucking Employees Involved in Safety Accidents" ("Employers are prohibited from firing, demoting, or *in any other way* discriminating against an employee who . . . [r]eports violations of vehicle safety requirements") (emphasis added).

[28] EEOC Compliance Manual (CCH) § 491.2 (1975) (emphasis added).

preventative or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765. If, as petitioner urges, section 704(a) were now construed to permit certain forms of reprisals against women workers who complain about sexual harassment, victims would legitimately be afraid to do so. The leading Fifth Circuit case establishing that circuit's "ultimate employment decision" standard involved retaliation against a woman because she had complained about sexual harassment; the Fifth Circuit held that the retaliation was lawful, despite an unchallenged jury determination that the retaliation in that case had caused $50,000 in damage. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).[29] Petitioner endorses the extraordinary result in *Mattern* as "faithful to *Ellerth*." (Pet. Br. 13). If this Court were to sustain Burlington Northern's contention that it may lawfully engage in the type of retaliation that occurred in this case, any Burlington Northern employee who knew of that ruling would quite reasonably be fearful of ever complaining about sexual harassment.

Petitioner and several amici urge this Court to adopt a clear rule that only certain specified types of retaliation are forbidden by section 704(a); such a rule would make equally clear that all other types of retaliation are permissible. That is precisely what this Court should *not* do. Such a holding would declare an open season on employees who engage in protected activities, albeit with small bore weapons. It would be permissible for an employer to threaten to use those judicially approved methods of retaliation in order to coerce an employee into withdrawing a Title VII charge, dismissing a Title VII action, or refusing to testify at a trial or administrative hearing. "That cannot be what Congress intended." *Deavenport v. MCI Telecommunications Corp.*, 973 F. Supp. 1221, 1226 (D. Colo. 1997).

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[29] We set forth in an appendix to this brief other decisions within the Fifth Circuit upholding as lawful retaliatory acts taken against women who complained about sexual harassment.

The EEOC's interpretation of section 704(a), although narrower than our reading of that provision, is consistent with its purpose. The Commission's 1972 Interpretive Manual concluded that "every" unremedied retaliatory act had a chilling effect.[30] Early Commission decisions held that retaliatory unfavorable job assignments were forbidden by section 704(a).[31] The Commission's 1984 Policy Guidance stated that a section 704(a) charging party need only show that he or she "was in some manner subject to adverse treatment."[32] In 1998 the Commission modified this standard in a manner favorable to employers, concluding that section 704(a) would not be violated by a retaliatory act so slight that it would not "deter a charging party or others from engaging in protected activity." EEOC Compliance Manual, § 8, par. 8008 (1998). That construction of section 704(a) is consistent with the purpose of the statute.[33] A rule that permitted an employer to retaliate against witnesses or charging parties in a manner that could deter testimony or the filing of charges would interfere with the functioning of the Commission. This Court has correctly been "reluctant to approve rules that may jeopardize the EEOC's ability to investigate . . . cases." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 n.11 (2002). Judicial administration of this EEOC standard has not proven in practice to present serious administrative

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[30] *See* text at n.29, *supra*. The 1972 Interpretive Manual was published in 1975 as the EEOC Compliance Manual.

[31] EEOC Dec. No. 70-130 (Sept. 5, 1969), 1969 WL 2880, *1-2 (change in shift); EEOC Dec. No. 70-601 (March 9, 1990), CCH EEOC Decisions (1973) par. 6124 (refusal to follow normal policy of assigning light work to injured worker); EEOC Dec. No. 74-77 (Jan. 18, 1974), 1974 WL 3847 *4 ("imposing unpleasant work assignments.")

[32] 1984 Policy Guidance, § 614.4(d) at 614-6.

[33] *Rochon v. Gonzales*, 2006 WL 463116 *6 (D.C.Cir. 2006). The Department of Labor construes in a similar manner the similarly phrased anti-retaliation statutes which it enforces. *See Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003), 16 (retrievable by name at www.oalj.dol.gov).

problems. It has been in effect in the Ninth Circuit for six years without causing demonstrable problems.[34] A similar deterrence standard has long been a staple of First Amendment jurisprudence. Respondent would unquestionably prevail under the EEOC standard.

(2) The Legislative Background of Section 704(a)

The broad language of section 704(a) has its roots in the anti-retaliation provisions of the National Labor Relations Act. Although earlier federal measures had forbidden only retaliatory dismissals or demotions,[35] sections 8(a)(3) and 8(a)(4) of the NLRA deliberately were not so limited. Rather, they provided without limitation that an employer could not "discriminate against" a worker for engaging in such protected activity. The Chairman of the National Labor Board (a precursor to the NLRB) explained that this broad language was intended to reach all types of retaliatory acts.[36]

Sections 8(a)(3) and 8(a)(4) have long been broadly interpreted to forbid the sort of changes in work duties involved in the instant case.[37] Title VII was consciously

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[34] *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

[35] *The National War Labor Board*, 33 Harv. L.Rev. 39, 42 (1919); Executive Order 6711-B (1935).

[36] 1 Legislative History of the National Labor Relations Act 149 ("Collective bargaining to have any real meaning required the employer to refrain from *all* discriminatory practices which would undermine organization. The most effective weapon which the employer possesses to disrupt a union is of course dismissal. Others of a more subtle character include discrimination as to wage or hour differentials, advancement, demotion, hire, tenure, reinstatement, division of available work. *All these*, the bill declares to be labor practices which are unfair, and provides means for their prevention.") (testimony of Dr. Francis Haas) (emphasis added).

[37] We set forth in appendix to this brief a list of pre-1965 decisions under the NLRA regarding retaliatory reassignments.

This remains the Board's position. In widely circulated publications (available on the Board's website), the Board assures workers that the

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modeled after the NLRA, and the interpretation of the NLRA that was established by 1964 has been relied on by this Court in construing Title VII itself. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976).

Petitioner argues that in adopting the 1991 Civil Rights Act Congress prospectively ratified a limitation on section 704(a) claims to employment actions that are *materially* and *ultimately* adverse. "The adverse-employment action rubric (which *led to* the ultimate- and materially adverse-employment-action-tests) was by then already well established." (Pet. Br. 44) (emphasis added). But the keystone of petitioner's brief (with which in this instance we agree) is that an interpretation of section 704(a) to broadly forbid "*any kind* of adverse action" (Pet. Br. 7) (emphasis in original) is very different than the far narrow construction proposed by Burlington Northern. Petitioner does not claim that either the "materially adverse" or "ultimate employment action" doctrines were the prevailing interpretation of section 704(a) in 1991.[38] To the extent that the lower courts after 1991 replaced the simple requirement of an adverse action with a limiting requirement of a materially or ultimately adverse action, that was a major change in the law. To describe Congress as having ratified in 1991 a change in the law that occurred years later is like asserting that Cardinal Richlieu supported Robespierre because the Bourbon dynasty "led to" the French Revolution.

NLRA forbids retaliating against workers by "assigning employees more difficult work tasks" ("The National Labor Relations Board and You," 2) or "assigning to a less desirable shift or job." ("Basic Guide to the National Labor Relations Act," 15).

[38] The first Sixth Circuit decision applying a "materially adverse" requirement to a section 704(a) case appears to be *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999). The earliest Fifth Circuit decision limiting section 704(a) cases to ultimate employment actions appears to be *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). It was not until 2000 that the Ninth Circuit adopted its standard on this issue, embracing the current EEOC standard. *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

C. THIS COURT'S DECISIONS IN *FARAGHER*, *ELLERTH* AND *SUDERS* DO NOT HOLD THAT SECTION 703 FORBIDS ONLY DISCRIMINATORY CONDUCT THAT RESULTS IN "A SIGNIFICANT CHANGE IN EMPLOYMENT STATUS"

Petitioner relies primarily on three decisions of this Court regarding sexual harassment: *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Those cases, petitioner urges, demonstrate that section 703 forbids only discriminatory conduct that results in "a significant change in employment status." Petitioner argues that this asserted limitation on section 703 should be extended to section 704(a).

But *Ellerth*, *Faragher*, and *Suders* neither adopt, nor support, any such limitation on section 703. The issue in these three cases emphatically was not whether the actions complained of was discriminatory. The jury in *Faragher* had found, and the complaints in *Ellerth* and *Suders* sufficiently alleged, the existence of sexual harassment sufficiently severe and pervasive to create a hostile work environment. The sole issue before this Court was whether the employers in those cases were vicariously liable for the discriminatory conduct at issue.

This Court held that an employer's liability for harassment by a supervisor was governed by traditional principles of agency law.[39] This Court recognized several circumstances under which an employer would clearly be liable under agency principles for sexual harassment by a company official. First, an employer is liable for harassment or other discriminatory acts undertaken by an employee whose "purpose, however misguided, is wholly or in part to further the master's business." *Ellerth*, 524 U.S. at 756 (*quoting* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser

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[39] *Ellerth*, 524 U.S. at 754; *Faragher*, 524 U.S. at 791; *Suders*, 542 U.S. at 144.

and Keeton on Law of Torts, § 70, p. 505 (5th ed. 1984)).[40] Second, an employer is liable for harassment or other discriminatory acts where the responsible official "was aided in accomplishing that [discrimination] by the existence of the agency relationship." *Ellerth*, 524 U.S. at 758 (*quoting* Restatement (Second) of Agency, § 219(2)(d)).

It was in this Court's discussion of the "aided in" branch of agency law that the phrase "tangible employment action" was used in *Ellerth* and *Faragher*. This Court declined to hold that the mere existence of an employment relationship between the victim and the company for which the supervisor also worked was sufficient by itself to satisfy the "aided in" requirement of agency law; as the Court explained in *Ellerth*, "there may be circumstances where the supervisor's status makes little difference." 524 U.S. at 763.

This Court used the phrase "tangible employment action" to refer to those instances in which a harasser manifestly *had* utilized his or her power or authority, and in which the discriminator was thus undeniably "aided in" that discrimination by his position with the employer.

> [W]e can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in the commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. . . . When a supervisor takes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . A co-worker can break a co-worker's arm as easily as a supervisor, [b]ut . . . one co-worker cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of

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[40] *Ellerth* noted that although company officials most often engage in sexual harassment for purely personal motives, there were instances in which such harassment was intended to further the purposes of the employer. 524 U.S. at 757.

> the supervisor. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act.

524 U.S. at 760-62. These passages make clear that "tangible employment action" refers to the actual exercise by a supervisor of his or her official authority in directing or affecting a subordinate. As the United States recently explained, a tangible employment action is "conduct that depends on a grant of authority from the employer to the supervisor."[41]

The decision in *Ellerth* contains other language that petitioner construes as going beyond merely requiring that a supervisor have utilized official power. But the very foundation of *Ellerth* and *Faragher* was that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." 524 U.S. at 754. There assuredly is nothing in agency law which restricts a principal's liability for the acts of an agent that are aided by the agent's official authority to instances in which the action taken by the agent is more than "minor." A principal is equally liable regardless of whether an agent uses his or her authority to commit a minor or major tort or breach of contract.

The actual holding in *Ellerth* and *Faragher*, spelled out in identically worded paragraphs in those opinions, and described by both as the "holding" of those cases, contains no reference to significant changes in employment status. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. 807-08. The relevant portion of that holding states that "[n]o affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as a discharge, demotion, or *undesirable*

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[41] Brief for the United States as Amicus Curiae, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), No. 03-95, 22.

reassignment." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. 808 (emphasis added). This holding requires only that the official action need be "undesirable," not materially adverse, or serious, or involving a significant change in employment status.

The issue in *Suders* was whether (or, more precisely, when) a constructive discharge constitutes a tangible employment action. The critical question, this Court held, was whether the events that compelled the plaintiff to resign included an official action, some use of a supervisor's official authority. "*Ellerth* and *Faragher* . . . divided the universe of supervisor-harassment claims according to the presence or absence of an official act," 542 U.S. at 151, not the presence or absence of an official act causing a certain type or magnitude of harm. *Suders* contains numerous passages which reiterate that whether a supervisor's action is a tangible employment action turns on whether the supervisor used his or her supervisory authority.[42] Any such use of official power precluded the affirmative defense if it was "to the employee's disadvantage." 542 U.S. at 148.[43]

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[42] *E.g.*, 542 U.S. at 140-41 ("We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge"), 144 ("an employer is liable for the acts of its agent when the agent 'was aided in accomplishing the tort by the existence of the agency relationship' "); 150 (explaining that the affirmative defense was available in *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003), because "the supervisor's behavior involved no official actions," "no direct exercise of company authority"); 152 n.11 (remanding for consideration of whether the affirmative defense might be unavailable because, although most of the harassment "involved unofficial conduct," the final incidents complained of "were less obviously unofficial.")

[43] *Suders* expressly approved *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), as a correct application of the rule that a tangible employment precludes the *Faragher/Ellerth* affirmative defense. 542 U.S. at 150. The official act involved in *Robinson* was the reassignment of a judicial secretary to work for a different judge, a reassignment that

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That *Ellerth*, *Faragher*, and *Suders* could not have intended to limit the prohibitions of section 703 to discriminatory actions that "significantly changes employment status" is made clear by the dramatic change that such a limitation would work on the long established meaning of section 703. Under the standard proposed by petitioner, women could be assigned to separate jobs than men so long as the differences in those jobs were not "significant." That assuredly is inconsistent with the intent of Congress "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). If section 703 applied only to "changes," it would not reach broad categories of discrimination which take the form of a refusal to alter a plaintiff's status, such as refusals to hire, denials of promotions,[44] raises or bonuses, or failures to stop known harassment by co-workers.

Under the petitioner's proposed standard, moreover, discriminatory assignments within a particular job title or position would not alter a worker's "status," and thus could never be illegal under section 703. Were this Court to so hold, whether it is legal to relegate minorities or women (or, on petitioner's view, people who testify at Title VII trials) to a particular type of work would vary from employer to employer, according to how each had structured its job titles. An employer could severely restrict the application of section 703 (and section 704(a)) simply by defining its job titles extremely broadly.[45]

(unlike the instant case) involved the identical work that the plaintiff had been doing before.

[44] Although the sentence in *Ellerth* relied on by petitioner expressly includes "failing to promote," that phrase is not contained in petitioner's proposed standard.

[45] In the instant case, the position of maintenance of way laborer includes 20 "key work activities" (including "performs all qualified duties, as necessary or as requested by management), 18 "key skill requirements," and several other tasks listed only in the "summary."

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Petitioner sets forth at page 30 of its brief a series of examples of the kinds of distinctions in assignment that under its proposed standard fall outside the prohibitions of section 703 (and 704(a)). Under that standard, an employer could assign female "law firm associate[s] [to] merely writ[e] briefs" while the male associates were "trying cases, which might be perceived as advantageous to partnership prospects." (Pet. Br. 30). A landscape company could assign African-Americans "to the dirtier tasks of mulching, weed control or grading," while whites were "riding [the] mower." (Id.) Jewish accountants could be directed "to do expense control and reimbursement," while gentile accountants did "the more prestigious task of preparing financial reports." (Id.). Far from being "trivial" or "trifling" distinctions with which Congress could not have intended to interfere, the examples cited by petitioner depict with unerring accuracy the discriminatory workplace that existed prior to the 1964 enactment of Title VII, and the very evils that statute was adopted to end.

Insofar as petitioner's argument relies on such a drastic modification of Title VII jurisprudence, it is a proposal to seriously weaken section 703 masquerading as a justification for substantially undermining section 704(a).

(JA 58-61). Even this list clearly is not inclusive; it makes no mention of White's own primary responsibility, operating a forklift.

D. THE COURTS HAVE NO AUTHORITY TO DISREGARD THE ACTUAL TEXT OF SECTION 704(a) IN THE NAME OF MANAGEMENT PREROGATIVES

Petitioner urges this Court to exclude "minor" retaliatory acts from the scope of section 704(a) in order to protect "management prerogatives." (Pet. Br. 28-31). Congress of course had no intention of authorizing the imposition of liability because of management decisions that did *not* involve an unlawful purpose or effect. In the instant case, however, petitioner does not question the correctness of the jury's finding that it acted with a retaliatory purpose, and petitioner does not claim that there is any legitimate management interest in retaliating against employees who engage in protected activities.

Petitioner instead advances a novel argument regarding management prerogatives. It asks this Court to bar imposition of liability in a case such as this in which there *was* an unlawful motive in order to prevent possible lawsuits against other employers whose actions were not motivated by such an improper purpose. Petitioner's argument rests on an empirical premise: that if minor retaliatory acts were declared unlawful, employers would be paralyzed by fear of the certain avalanche of baseless section 704(a) claims, virtually all of which would be certain to require a jury trial.

If it were appropriate for this Court to entertain such an empirical argument, it assuredly could not be sustained. For six years the Ninth Circuit has adhered to the EEOC's interpretation of section 704(a), which petitioner insists is so expansive as to permit litigation over "the most trivial workplace conduct." (Pet. Br. 46). But no tsunami of baseless section 704(a) claims has swept over the district courts in the Ninth Circuit.[46] Section 704(a)

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[46] The Ninth Circuit adopted the EEOC standard in *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000). Since that time there have

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claims are not certain to reach a jury; district courts routinely grant summary judgment in such cases because of insufficient evidence of a retaliatory motive. As a practical matter, even irritable, chip-on-the shoulder workers have the good sense to understand the costs and risks involved in suing their employers, and attorneys – who usually will be paid only if they prevail on the merits – will rarely take a case which lacks significant merit and potential for recovery.

Petitioner's empirical assertions in any event do not provide an appropriate basis for resolving the question presented. Nothing in the language of Title VII authorizes the courts to legalize a category of otherwise forbidden retaliation whenever the judiciary thinks that doing so might enhance legitimate management prerogatives in *other* cases. Any statutory prohibition carries with it some risk that innocent defendants will be sued and incur significant litigation costs. When Congress enacts a law, it has presumably concluded that that unavoidable unfairness is outweighed by the importance of the underlying prohibition. The courts are not at liberty to reconsider that judgment.

Petitioner suggests that its proposed limitation on section 704(a) is necessary to prevent an increase in "[t]he already extraordinary number of Title VII filings." (Pet. Br. 29, 49). The number of Title VII charges filed with the EEOC in 2005 was actually the lowest in any year since 1992.[47] Narrowing the protections of section 704(a) simply

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been only 30 decisions reported in Westlaw even citing the relevant portion of *Ray* (headnote [8]), about one every other month.

[47] See http://www.eeoc.gov/stats/charges.html. The total number of charges in 2005 was 75,428, down from a high of 91,189 in 1994. The numbers cited by petitioner reflect only an increase in the number of instances in which a charging party asserted in a single charge that two or more different types of violations occurred. In the past, when employees generally took their first complaint to EEOC, retaliation occurred *after* the filing of the charge, and thus was not (and did not

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to reduce the number of retaliation charges filed with the EEOC is like modifying the permissible blood alcohol level in order to reduce the number of drunk driving charges.

E. PETITIONER'S PROPOSED STANDARD IS UNWORKABLY VAGUE

The petition in this case urged that review be granted "to bring uniformity and certainty to this badly muddled area of the law." (Pet. 9). We urge this Court to adopt the following straightforward standard regarding which actions an employer is forbidden to deliberately take against an employee because that worker has engaged in activity expressly protected by federal law: all.

Petitioner[48] proposes a more complicated, ambiguity-ridden rule. A retaliatory act is unlawful if, but only if, that action either (a) "adversely and significantly changes employment status"[49] or (b) created, by itself or in conjunction

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need to be) included in that charge. In recent years, as contemplated by this Court in *Ellerth*, employers have established and employees have increasingly utilized internal complaint mechanisms. Because any retaliation at that stage occurs *before* the filing of the charge with EEOC, charges today are more likely to raise both a claim of retaliation as well as the underlying discrimination claim. That is precisely what occurred in the instant case. (JA 29).

[48] Neither petitioner nor any of the amici appear to support adoption by this Court of the Fifth Circuit's "ultimate employment action" doctrine. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

[49] Pet. Br. 11. We understand this to be petitioner's proposed standard because petitioner describes it as "[t]he proper standard" (Pet. Br. 11) and repeats it most frequently. (Pet. Br. 2, 11, 13, 24, 25).

In two instances petitioner also describes the standard as including actions that "caus[e] a significant change in *benefits*." (Pet. Br. 9, 22) (Emphasis added). In four instances petitioner proposes a rather different formulation, "an employer-sanctioned adverse action officially changing [an employee's] employment status or *situation*." (Pet. Br. 9, 22, 25, 31) (Emphasis added). This formulation covers changes in a

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with other retaliatory actions, a hostile work environment.[50] This formula raises a wide range of questions that will guarantee years of litigation and uncertainty in the lower courts.

What changes concern an employee's "status"?

The linchpin of petitioner's proposed standard is a new and critical legal distinction between retaliatory acts that do and do not affect an employee's "status." Retaliatory acts that do not change a worker's "status" are lawful per se (subject to a hostile work environment exception). On the other hand, retaliatory acts that affect a worker's "status" are reviewed under the "significance" standard. Petitioner explains this distinction only so far as to state that changes in work assignments within the same job title are not "status" changes, but that transfers to a position with a new title do constitute a new employment "status." This distinction would require the lower courts to decide among the myriad of other possible changes affecting a worker which do and do not constitute changes in "status." With regard to the work done by an employee, for example, courts would have to resolve whether a change in the hours, shift, facility in which an employee worked constitutes a shift in "status." The lower courts would also have to determine whether a change in a worker's benefits could constitute a change in "status," and if so which benefits: wage rates, overtime, expense accounts, pensions, life insurance, research grants, severance pay, medical coverage, the number of vacation, sick, or personal days, or use of a company car or dining room.

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worker's "situation," as well as his or her "status," and does not require that change to be "significant."

[50] Pet. Br. 32.

What changes involve "employment" status?

Because under this proposed standard it matters whether a change affects "employment" status, the lower courts would be required to address what types of actions and changes should be deemed to relate to employment. This would raise two types of issues. First, questions would have to be resolved regarding individuals who have some connection with a firm, but are no longer active employees, such as retirees (who might be getting pension or medical care benefits), former employees (who might be getting severance or other benefits), or laid off workers. In this regard adoption of petitioner's standard would raise questions about the continuing soundness of *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (section 704(a) applies to denial of reference to former employee), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (section 704(a) retaliation claim by former-employee denied rehire). Second, it would be necessary to decide when actions outside the workplace itself but affecting current employees could be said to be related to their employment relationship.

When is a change in employment status "significant"?

A transfer to a new position would constitute a change in "status"; courts would have to determine when the differences between a plaintiff's new and old position were "significant." There is a wide range of types of differences that could exist between those two positions: location, shift, hours, physical difficulty of the work, safety, dirt, noise, noxious fumes, degree of administrative responsibility, the length and nature of the worker's commute, the extent to which each job utilizes the worker's skills, the potential for promotion, raises, or learning new skills, the possibility of overtime, the risk of layoff, the opportunity to affect policy, the availability of benefits such as flex time, the prestige attached to the position, the comparative risk of harassment or other (lawful or unlawful) abusive behavior by colleagues or superiors, and the interesting or boring nature of the work involved. The lower courts

would have to determine how much weight to give each of these types of factors in deciding whether any particular transfer involved a "significant" change.

Are there retaliatory practices that should be analyzed outside this formula?

The lower courts today appear to be in agreement that an employer would violate section 704(a) if it retaliated against an employee by reducing his or her wages. Petitioner repeatedly stresses that in the instant case the disputed change of duties did not involve a reduction in pay. (Pet. Br. 26, 28). But if petitioner's general rule applies even to wages, then a "minor" (rather than "significant") pay cut would be a permissible form of retaliation. One amicus indeed asserts that only an "extreme" reduction in pay would be illegal under section 704(a).[51] If, on the other hand, retaliatory changes in wages are unlawful per se, the courts would have to decide whether such a per se rule applied to other retaliatory acts that could reduce the amount of money an employee made, such as reduced overtime, bonuses, pension contributions, assignment to clients who generate large commissions, or per diem allowances.

How should courts deal with retaliatory conduct that will or may "cause" a significant change in employment status at a subsequent point in time?

A retaliatory action which at the time of trial (or motion for summary judgment) has not yet caused such a result will often be capable of leading to that very result at a later date. For example, a change in jobs, or even duties within the same job, may increase the danger that a worker will subsequently be laid off, demoted, or denied a promotion, partnership, or raise. The lower courts would

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[51] Brief of the Society for Human Resource Management, et al., p. 14.

have to decide among a number of different standards for evaluating retaliatory acts which have not yet caused a significant change in employment status, but which might do so in the future: (1) classify the retaliation as unlawful if there is a sufficiently great probability (however defined) that it will in the future lead to a consequence sufficient in type or magnitude, (2) treat such a retaliatory act as unlawful if the employer intended (or, perhaps, foresaw or could have foreseen) such an ultimate consequence, or (3) hold that the employer has violated the law only if and when the required consequence actually occurs, forcing future judges and juries (possibly years later) to determine whether a later seriously adverse action was caused by the earlier retaliation.

II. AN EMPLOYER CANNOT "CURE" A VIOLATION OF SECTION 704(a) BY PROVIDING PARTIAL RELIEF FOR THE VIOLATION

Petitioner asserts that an employer is not liable for "corrected actions." (Pet. Br. 35). If an employer could show that it had already provided a plaintiff with all the relief that a court could award, a complaint would of course be dismissed.

But that is not petitioner's point. Rather, petitioner contends that an employer which provides a plaintiff *partial* relief is entitled to immunity from suit for the remaining relief. With regard to an unlawful dismissal (or suspension without pay) violating section 704(a), petitioner argues that a plaintiff is barred from seeking compensatory and punitive damages if the employer has restored the plaintiff to work and provided full backpay.

Petitioner asserts that reinstatement and back pay are a "substantially comprehensive remedy for improper suspension and/or dismissal," and that the other harms caused by an unlawful suspension or dismissal, such as "temporary humiliation and fear of losing a job, and short term eco nomic difficulties of being without a paycheck – generally

must be borne by the employee." (Pet. Br. 41). In 1991 Congress amended Title VII to provide compensatory damages for the express purpose of shifting just those costs from the employee to the employer.

> "Who should bear the[se] non-wage costs of intentional, illegal discrimination, the perpetrator of discrimination or the victim?" Under current Title VII law, it is the victim. Because Title VII permits no recovery of compensatory . . . damages, discrimination victims cannot be made whole for these types of losses. . . . [T]he deficiency in Title VII's remedial scheme hinders both of Title VII's principal goals: that of making discrimination victims whole for their losses, and that of encouraging citizens to act as private attorneys general to enforce the statute.

H.R. Rep. 101-644, pt. 1, p. 39 (101st Cong., 2d Sess.) (1990).

Petitioner insists compensatory damages are unimportant in dismissal or suspension cases because the affected employees rarely if ever suffer any injury other than the loss of income that would be fully remedied by backpay. Other injuries, petitioner asserts, occur only in "extraordinary cases" and involve at most only "some hardship." (Pet. Br. 41). Being out of work for weeks or months may well cause little or no hardship to an individual with a large well-balanced portfolio of stocks and bonds. But employees who lack such resources, unfortunately, are not "extraordinary cases." To the contrary, tens of millions of working men and women live from paycheck to paycheck. For those men and women, even a few weeks out of work can mean less (or at least different) food on the table and a decline in quality of life; months of unemployment can easily lead to eviction from a home or repossession of a car. For workers who have limited skills or live in an area with significant unemployment, losing a job does not conveniently leave them "free to obtain temporary, substitute employment" (Pet. Br. 41); it is a

prescription for long term joblessness and economic disaster. Although in the instant case the reinstatement occurred in 37 days, petitioner insists that an employer's right to avoid liability by partially correcting a violation is not related to "the length of time it took." (Pet. Br. 41 n.12; *see* Pet. Br. at 36 n.9 ("An employer may cure an adverse action . . . before that action is the subject of litigation."))

Prior to 1991, when Title VII was amended to permit compensatory and punitive damages, a court could award only backpay and other equitable relief. Petitioner insists that Congress could not possibly have regarded as unlawful an employment practice for which Title VII before 1991 provided no remedy. (Pet. Br. 36). To the contrary, that is precisely what Title VII says, and what Congress believed.[52] The definition of an "unlawful employment practice" in section 704(a) is not and has never been tied in any way to the type of relief available under section 706. The precise problem which prompted Congress in 1991 to authorize compensatory damages was that the limitations in section 706 meant that the relief available for certain types of violations was either inadequate or non-existent. "In cases . . . in which prior law afforded no relief, [the 1991 Act] can be seen as creating a new cause of action." *Landgraf v. USF Film Products*, 511 U.S. 244, 283 (1994).

Petitioner urges that employers would be encouraged to voluntarily offer workers partial relief (here, reinstatement and backpay) if by doing so they could obtain immunity from liability for other forms of relief provided by Title VII (compensatory and punitive damages). That is probably so. But this Court has no authority to exempt such employers from their legal obligation to pay compensatory

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[52] Congress provided for compensatory damages under the 1991 Civil Rights Act precisely because "[a]ll too frequently, Title VII leaves victims of employment discrimination without remedies of any kind for their injuries and allows employers who intentionally discriminate to avoid any meaningful liability." H.R. Rep. 101-644, pt. 2, p. 35 (101st Cong., 2d Sess.) (1990).

or punitive damages. Such a system of self-absolution would seriously undermine a key purpose of the 1991 Civil Rights Act, to increase deterrence of Title VII violations.

> The failure to provide compensatory and punitive damages in Title VII leaves the statute without a meaningful deterrent to intentional discrimination on the job. As Judge Clarence Thomas, former Chair of the U.S. Equal Employment Opportunity Commission has stated: ["T]he equitable remedies available under Title VII are not as compelling as the civil damages available under other federal statutes. . . . [T]here have to be disincentives available rather than merely equitable relief."

S. Rep. 101-315, p. 35 (101st Cong., 2d Sess.) (1990). Title VII itself creates a specific scheme for encouraging resolution of retaliation (and discrimination) claims short of litigation; section 706(b) directs the EEOC to seek to resolve meritorious claims through "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The hallmark of this statutory scheme is that settlements involving less than full relief, while entirely permissible, require the assent of the aggrieved plaintiff. It would be fundamentally inconsistent with section 706(b) to permit employers to impose on aggrieved employees a partial remedy to which the employees are unwilling to agree.

Employers already have substantial incentives to provide partial relief without awaiting litigation or even the filing of an EEOC charge. Reinstatement cuts off the accumulation of further liability for backpay or compensatory damages. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). An offer of backpay will largely eliminate the risk of suit by workers who have suffered no significant other injury. If suit were brought, an employer's action in reinstating with backpay an improperly dismissed employee would provide significant support for an employer's efforts to avoid liability for punitive damages to the extent

that it showed that any unlawful action engaged in by a company official was "contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 546 (1999).

III. PETITIONER IS LEGALLY RESPONSIBLE FOR ITS OWN ACTION IN REMOVING WHITE FROM SERVICE FOR 37 DAYS

A. THIS ISSUE IS NOT WITHIN THE SCOPE OF THE QUESTION PRESENTED

The Question Presented in the petition framed a question about what types of retaliatory acts are sufficiently serious to be unlawful; there was, the petition argued, an inter-circuit conflict regarding "the appropriate standard for proving an adverse employment action." (Pet. 8).[53] In the courts below petitioner argued only that any violation that had occurred when White was removed from her job had been adequately remedied because the company reinstated White with backpay;[54] Burlington Northern never denied legal responsibility for the initial decision to remove White from employment.

In its merits brief, however, petitioner raises a new and quite distinct issue. Even if this Court concludes that White suffered an actionable injury when she was removed from employment in retaliation for her EEOC charge, Burlington Northern now asserts that it is not

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[53] In petitioner's merits brief the Question Presented has been rewritten to omit reference to what constitutes an adverse action, and to frame a question about an employer's liability for an action (however adverse) that was to be reviewed following an employer-initiated investigation. (Pet. Br. i).

[54] Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law, 4 ("Plaintiff . . . failed to prove at trial that she suffered an adverse employment action as a result of Percy Sharkey pulling her out of service."); Final First Brief of Appellant/Cross-Appellees, 15 ("A temporary suspension is not an adverse employment action.").

legally responsible for that retaliatory act. This contention was not raised in the courts below, and it is not fairly encompassed within the Question Presented.

Consideration of this new claim is particularly inappropriate because it would turn at least in part on two factual issues that the lower courts were never asked to resolve. First, this argument rests on petitioner's assertion that at the time of the December 11 decision company officials intended to conduct on their own initiative an investigation of White's actions, and that White was reinstated as a result of that planned inquiry. (Pet. Br. 36-37) ("White's initial suspension was always tentative.") Petitioner criticizes the Sixth Circuit for misstating the facts.[55] But the factual assertions now advanced by petitioner are inconsistent with its representations in the court of appeals[56] and are not supported by the record.[57]

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[55] Pet. Br. 38 n.10.

[56] Supplemental Brief of Defendant/Appellant/Cross-Appellee on Rehearing En Banc, 24 ("under the particular process here White had to request a review of her situation, as opposed to other companies that place employees on decision-making leave and then investigate whether the employee requests it or not"); Final Third Brief of Appellant/Cross-Appellee, 11-12 ("Brown had nothing to do with that hearing [which led to White's reinstatement] and had no knowledge of what happened regarding White's suspension after he advised Sharkey on the matter.").

[57] There were at this facility two possible types of investigations, an "internal investigation" initiated by the company itself and based on interviews by human resources officials (III Tr. 492, 494, 498) and a "formal investigation," a term of art for the adversarial hearing conducted by union and company representatives at the request of the disciplined worker or the union. (III Tr. 498, 552).

Brown initially testified that White had been suspended pending an internal investigation by the company itself. (III Tr. 510). But on cross-examination he conceded that that was not true, and that White's dismissal would have been permanent if she had not exercised her right to ask for a hearing. (III Tr. 553-54). McGee, who was responsible for conducting all company internal investigations (III Tr. 588), testified that she never talked to White at any time after September 1997, several months *before* White lost her job. (III Tr. 648).

Second, petitioner relies heavily on its proposed interpretation of Rule 91(b)(5) of the CBA. It is far from clear that Rule 91(b)(5) has the meaning claimed by petitioner. This new dispute about the meaning of Rule 91(b)(5) would (if raised prior to trial) require consideration of evidence regarding the negotiation of that provision. Restatement (Second) of Contracts, § 214 (1981).

In the Joint Pretrial Order in the district court, however, petitioner did not advance either of these factual contentions. Thus neither that Order nor the instructions directed the jury to decide whether company officials intended on December 11 to conduct any further inquiry or whether the parties to the collective bargaining agreement intended that Rule 91 would modify Burlington Northern's potential liability under Title VII. Judgment as a matter of law was not sought with regard to either factual issue, since neither had been determined by the jury. If petitioner wished to advance a legal theory under which those factual issues were of importance, it was obligated to do so before the August 2000 trial in this case. Petitioner cannot now ask this Court to resolve such factual issues, and it cannot plausibly request five years after that trial that a second evidentiary hearing now be held on factual issues it failed to raise in the Joint Pretrial Order.

B. AN EMPLOYER WHICH FOR A PURPOSE FORBIDDEN BY SECTION 704(a) DISMISSES OR SUSPENDS A WORKER WITHOUT PAY - AND THEN REINSTATES THAT WORKER - IS LEGALLY RESPONSIBLE FOR ANY RESULTING INJURY

The issue raised by petitioner, although important, is in certain respects a narrow one.

Petitioner argues only that Title VII provides no relief for injuries if (a) they were sustained when an employer, at its own initiative, was considering whether to finalize

an interim adverse action, and (b) the employer on its own initiative ultimately overturned that interim action and provided any backpay to which the worker is entitled. Petitioner does not suggest that this limitation would apply to an employee-initiated appeal, and does not ask this Court to overrule the decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), that Title VII plaintiffs are not required to exhaust private remedial mechanisms, and that plaintiffs who do so are not precluded from also seeking redress in federal court.

We, on the other hand, acknowledge that an employer faces no liability if a supervisor suspends an employee, pending an employer-initiated investigation, because that supervisor actually believes that such a suspension is necessary to avoid safety, discipline or other problems. The absence of such liability, however, has nothing to do with any distinction between interim and final decisions. If the supervisor's decision to impose the suspension was made (even mistakenly) for entirely legitimate reasons, untainted by any discriminatory or retaliatory purpose, no unlawful employment action has occurred; it remains lawful whether or not the employee is ultimately reinstated. In this case, however, the jury found that the Burlington Northern official who made the December 11 decision to end White's employment, Roadmaster Brown, did so because of a desire to retaliate against White for engaging in protected activities, not because Brown actually believed that White had been insubordinate or actually thought that the possibility of insubordination was sufficiently great that suspension was a prudent precaution.

The legal issue[58] is thus whether an employer is responsible for injuries caused by an unlawfully motivated

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[58] As we note *supra*, the record does not support petitioner's contention that the events that occurred between December 11 and January 16 were an employer-initiated investigation. We explain in this portion of our brief why petitioner would still be liable even if that were what had occurred.

dismissal or suspension if some other (or even the same) official subsequently decides, as a result of an employer-initiated further inquiry, to reinstate that worker with backpay.

(1) Liability Under Agency Principles

Burlington Northern officials made two distinct decisions regarding White's removal from service. First, on December 11, 1997 Roadmaster Brown removed White from service; that action caused the injury complained of, and the jury found that it was taken to punish White for having engaged in protected activity. Second, on January 16, 1998 Bernie Vaughn, the Division Engineer, reinstated White to her job and awarded her backpay. That action caused no injury, and there is no finding or claim that it was the result of an unlawful motivation. Petitioner claims that only the January 16 action was an "official action" of the company.

The extent of petitioner's liability for the actions taken on December 11 is controlled by agency principles. An employer is liable for injuries caused by its agents if the agent was aided in the commission of the wrong by the exercise of powers conferred by the employer. That is precisely what occurred here. Only a supervisor exercising company authority could have removed White from her job and from the company payroll. It is of no significance under agency law that a *subsequent* official action may countermand that earlier decision. So long as the injury complained of was caused by a company official exercising his or her official authority – be it a tort, a breach of contract, or a Title VII violation – it does not matter whether that action was avowedly interim in nature or was later to be reviewed by a higher ranking official.

Nothing in the text of section 704(a) overrides these agency principles. The command that employers not "discriminate against" workers for protected activities is not limited to discrimination in the making of "final" decisions. The standard for the award of punitive damages

set out in *Kolstad* does to some degree distinguish between lower level officials (who may be violating a company anti-discrimination policy) and higher management (which may be making every reasonable effort to enforce such a policy). But there is no comparable limitation on the award of compensatory damages.

(2) The Collective Bargaining Agreement

The collective bargaining agreement between Burlington Northern and the Brotherhood of Maintenance Way Employees did not and could not immunize the company from suit.

Petitioner contends that the CBA embodies an agreement to modify in two ways the usual terms of Title VII. First, the union assertedly agreed to surrender White's right to compensatory and punitive damages in return for the procedures and remedies in Rule 91. "The union and management deemed the employee fully protected by the bargained-for procedure." (Pet. Br. 38). Second, the union assertedly consented to a modification of normal agency rules, relieving Burlington Northern from liability for any "interim" disciplinary decisions. "Labor and management agreed on what constitutes the 'decision of the Carrier' on discipline." (Pet. Br. 39). Even though under agency principles the initial imposition of discipline by a lower level supervisor would be an action for which an employer was liable, the CBA assertedly provided otherwise.

No collective bargaining agreement could legally modify or waive in this way the remedies provided by Title VII or the agency principles which Title VII directs the courts to apply.

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of those

> rights would defeat the paramount congressional purpose behind Title VII.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

Rule 91 assuredly does not purport to modify or affect in any way the remedies and liability principles established by Title VII. Rule 91(b)(5), on which petitioner relies, merely provides: "A decision will be rendered by the Carrier within 10 days after completion of the investigation." (JA 57). This sentence cannot plausibly read as asserting that such a post-investigation decision would be the *sole* decision that constitutes a decision of the carrier.[59]

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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[59] The Brotherhood of Maintenance of Way Employes, which was the party to the CBA in question, rejects petitioner's interpretation of Rule 91(b)(5). Brief of the American Federation of Labor and Congress of Industrial Organizations and the Brotherhood of Maintenance of Way Employes Division, International Brotherhood of Teamsters as *Amici Curiae* in Support of Respondent.

Federal Statutes Forbidding An Employer To "Discriminate Against" Employees Who Engage in Protected Activities

2 U.S.C. § 1317(a) (various rights of congressional employees)

3 U.S.C. § 417(a) (various rights of certain employees in the office of the President)

5 U.S.C. § 7116 (unfair labor practices by federal agencies)

10 U.S.C. § 2409(a) (reporting violations of the law by federal contractors)

12 U.S.C. § 1441a(q)(1) (reporting possible violations of the law to the Thrift Depositor Protection Oversight Board)

12 U.S.C. § 1790b (reporting possible violations of the law by credit unions or supervising federal officials)

12 U.S.C. § 1831j (reporting possible violations of the law or gross mismanagement by banks or federal agencies overseeing banks)

15 U.S.C. § 2622 (control of toxic substances)

15 U.S.C. § 2651(a) (asbestos hazard)

18 U.S.C. § 1514A (employees of publicly traded corporations who disclose information to the SEC, Members of Congress, or federal regulatory agencies)

20 U.S.C. § 3608 (disclosure of asbestos hazard in school)

20 U.S.C. § 4018 (disclosure of asbestos hazard in school)

22 U.S.C. § 4115 (rights of Department of State employees to join, or refrain from joining, union)

29 U.S.C. §§ 158(a)(3), 158(a)(4) (National Labor Relations Act)

29 U.S.C. § 215(a)(3) (Fair Labor Standards Act)

29 U.S.C. § 623(d) (Age Discrimination in Employment Act)

29 U.S.C. § 660(c)(1) (Occupational Safety and Health Act)

29 U.S.C. § 1140 (ERISA)

29 U.S.C. § 1855(a) (Migrant and Seasonal Agricultural Worker Protection Act)

29 U.S.C. § 2002 (Employee Polygraph Protection Act)

29 U.S.C. § 2615(a) (Family and Medical Leave Act)

30 U.S.C. § 815(c)(1) (mine safety)

30 U.S.C. § 1293(a) (surface mining control and reclamation)

31 U.S.C. § 3730(h) (false claims against the United States)

31 U.S.C. § 5328(a) (disclosure to federal officials of violations of laws regarding reports of monetary transactions)

33 U.S.C. § 948a (longshore and harbor workers' compensation)

33 U.S.C. § 1367(a) (water pollution prevention and control)

38 U.S.C. § 4311(b) (rights of members of the armed services to reemployment)

41 U.S.C. § 265(a) (violations of the law by federal contractors)

42 U.S.C. § 300j-9(i)(1) (safety of public water systems)

42 U.S.C. § 2000e-3(a) (Title VII)

42 U.S.C. § 5851(a)(1) (nuclear whistleblower protection)

42 U.S.C. § 6971(a) (solid waste disposal)

42 U.S.C. § 7622(a) (air pollution)

42 U.S.C. § 9610(a) (CERCLA)

42 U.S.C. § 12203(a) (Americans with Disabilities Act)

46 U.S.C. § 2114(a) (maritime safety)

46 U.S.C. App. § 1506(a) (unsafe cargo containers)

49 U.S.C. § 20109(a) (railway safety)

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49 U.S.C. § 42121(a) (whistleblowing by employees of air carriers or contractors or subcontractors of air carriers)

49 U.S.C. § 60129(a) (pipeline safety)

50 U.S.C. § 2702(a) (whistleblowing related to military atomic energy facilities)

Decisions Under Section 8 of the National Labor Relations Act January 1, 1960 to July 1, 1964 Regarding Retaliatory Assignments

Guerdon Industries, Inc., 127 NLRB 810 (1960) ("[employer] discriminatorily transferred [employee] to a less desirable job at the same rate of pay . . . and . . . discriminatorily ordered [employee] to perform certain work . . . with the knowledge that such work was detrimental to [employee's] health.")

Quality Food Markets, Inc., 126 NLRB 349 (1960) ("[employer] discriminatorily transferred [employee] from its Calumet store to its Lake Linden store.")

Montauk Iron & Steel Corp., 127 NLRB 993 (1960) (warehouse employee "was assigned by the employer's managing agent to 'yard' or 'outside' work.")

Manbeck Baking Co., 130 NLRB 1186 (1961) (employee who "was employed as a dough mixer for a 2 1/2 year period . . . was transferred . . . to a panwashing assignment in the basement.")

Minnesota Manufacturing Co, Inc., 132 NLRB 1398 (1961) (clothes pressers assigned to work as sewing machine operators)

Beiser Aviation Corp., 135 NLRB 399 (1962) (because he had testified, the employee (1) was forced to spend three days at a table placed in the center aisle of the jet engine room while attempting to carry out what the trial examiner found to be an "impossible assignment", and (2) was relieved of his record-keeping duties and directed instead to do the work of an ordinary mechanic.)

Anderson-Rooney Operating Co., 134 NLRB 1480 (1961) ("[employee] was discriminatorily transferred from his job at the Sunray building to the Mid-Continent Building.")

Park Inn Hotel, Inc., 139 NLRB 669 (1962) ("[employer] discriminated against the . . . waitresses upon their return after the strike by assigning them more onerous and less agreeable work")

Morris, Seawall & Co., 138 NLRB 1067 (1962) (employee was transferred, without prior notice, to a distant store to which, lacking a car, he could not readily commute.)

Trumbull Asphalt Co. v. NLRB, 314 F.2d 382 (7th Cir. 1963) (upholding NLRB finding that the employer violated the NLRA by "discriminating against . . . employees due to their union activities, by assignments to disagreeable work.")

Sea-Land Service, Inc., 146 NLRB 931 (1964) (union official's duties changed from those of "chief clerk" to those of "regular clerk.")

American Compressed Steel Corp., 146 NLRB 1463 (1964) (employee "transf[erred] . . . from his over-the-road hauling to the disagreeable job of hauling tin cans from local dumps, a task which involved picking up, dumping, and frequently raking filthy, vermin-infested cans")

Daylight Grocery Co., 147 NLRB 733 (1964) (employee "was transferred to the grocery department in another store.")

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Bievere v. American Airlines, Inc., 1996 WL 560073 *3 (E.D.La. 1996) (causing denial of workers' compensation claim)

Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994) (effort by former employer to have plaintiff decertified as a teacher)

Clardy v. Silverleaf Resorts, Inc., 2001 WL 1295480 *4 (N.D.Tex. 2000) (obstructing efforts to obtain workers' compensation)

Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977) (warning prospective employer that plaintiff had filed Fair Labor Standards Act claim against former employer)

EEOC v. Outback Steakhouse of Florida, Inc., 75 F. Supp. 2d 756 (N.D.Ohio 1999) (bad faith counterclaim)

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Rochon v. Gonzales, 2006 WL 463116 (D.C.Cir. 2006) (refusal to investigate death threats against plaintiff)

Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1163-64 (10th Cir. 1977) (modification of letter of reference

to warn that plaintiff had filed a sexual harassment charge against her former employer)

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Commission Decision 72-0139 (1972) (unwarranted opposition to unemployment compensation) (*see* 1998 Policy Guidance § 614.7(F)(2))

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In The Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent submits this supplemental brief pursuant to Rule 25.5 of this Court.

Under the unique circumstances of this case, the brief for the United States constitutes "intervening matter that was not available in time to be included in a brief." A majority of the government's argument consists of an attack on the literal reading of section 704(a) advanced by respondent.[1] If this Court were to adopt the government's narrow reading of section 704(a), it is far from certain that respondent would prevail. The original panel of the Sixth Circuit that heard this case applied a version of the "materially adverse" formulation now advanced by the United States and concluded that the retaliation that occurred in this case was lawful under section 704(a). (Pet. App. 93a-103a). The interpretation of section 704(a) proposed by the Solicitor General is different from that of petitioner, and constitutes a candid repudiation of the position heretofore taken by the EEOC. (U.S. Br. 15-16 n.4). The new matters raised by the government's brief could not have been addressed in the brief for respondent; the two briefs were filed on the same day.

[1] *Compare* R. Br. 8-28 *with* U.S. Br. 9-20.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF SECTION 704(a) IS INCONSISTENT WITH THE TEXT AND PURPOSE OF THAT PROVISION

A substantial portion of the government's argument is devoted to three inter-related propositions: that section 704(a) forbids only the types of actions forbidden by section 703, that section 703 is limited to discrimination in the terms and conditions of employment, and that section 704(a) does not forbid retaliation outside the employer-employee relationship. (U.S. Br. 9-20). These contentions are squarely inconsistent with the position taken by the United States in this Court in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

In *Robinson*, the court of appeals had held that section 704(a) does not forbid retaliation against former employees; the lower court reasoned that section 704(a) forbids only the types of employment practices covered by section 703(a), and thus was limited to retaliation occurring when the victim was still an employee. *Robinson v. Shell Oil Co.*, 70 F.3d 325, 330-31 (4th Cir. 1995).[2] The United States, urging this Court to reverse the decision of the circuit

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[2] It is unclear whether, or to what extent, the United States now believes that *Robinson* should be overruled. In some passages, the government asserts that section 704(a) does not apply to retaliation "outside of the employment relationship." (U.S. Br. 19). That would seem to mean that retaliation against a former employee – one who no longer has such a relationship with the employer – would always be lawful. Elsewhere, the United States states more ambiguously that the retaliation need only be "employment-related conduct." (U.S. Br. 18). That might apply to some types of retaliation against a former employee (e.g., if it prevented the victim from obtaining employment with another employer) but not to others (e.g., a harassing lawsuit).

court, correctly objected that this line of reasoning misconstrued the relationship between sections 704(a) and 703.

> That analysis reflects a misunderstanding of Title VII in several respects. It overlooks important differences between Section 703 and Section 704 of Title VII. Section 703(a) declares it to be an "unlawful employment practice" to violate Title VII's substantive prohibition against discrimination with respect to certain specified actions by employers, all of which are related to employment. Section 704(a) provides that it shall also be an "unlawful employment practice" to discriminate against a covered individual "because he has made a charge" under Title VII. Violations of Section 704(a) are not limited to the "unlawful employment practice[s]" listed in Section 703(a). Rather, Section 704(a) "speaks unconditionally, without limitation to acts causing particular harms. . . . " *Smith v. Secretary of the Navy*, 659 F.2d 113, 119 n.56 (D.C.Cir. 1981).[3]

The United States made the same point at oral argument. "[Section] 704, unlike 703, doesn't say discrimination in the terms, conditions or privileges of employment. It just says discrimination."[4]

The government does not explain how even its new reading of the relationship between sections 704(a) and 703

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[3] *Robinson v. Shell Oil Co.*, No. 95-1376, Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, 22-23 (footnote omitted). That footnote read in part, "The unconditional nature of Section 704(a) reflects its broad purpose of ensuring the effectiveness of the prohibitions on employment discrimination." *Id.* at 23 n.12.

[4] Transcript of Oral Argument, *Robinson v. Shell Oil Co.*, 1996 WL 656475 *22.

supports its suggestion that section 704(a) applies only to retaliation constituting a "materially adverse employment action." Even under section 703(a)(1) any work assignment, employer-imposed working condition, or benefit is a "ter[m], conditio[n] or privileg[e] of employment." The phrase "materially adverse" is nowhere to be found in the government's eleven page discussion of the connection between section 704(a) and 703. (U.S. Br. 9-20).

This phrase first makes its appearance at page 21 of the brief for the United States. There the government asserts (correctly in our view) that to establish a prima facie case under section 704(a) a plaintiff must show that he or she has suffered an "adverse employment action."[5] The United States then observes that a number of courts of appeals have "held that an employee must show a materially adverse change in the terms, conditions, or privileges of employment *to satisfy* the adverse action element of the prima facie case." (U.S. Br. 21) (emphasis added). This sentence is somewhat perplexing. The whole thrust of the government's brief is to urge this Court to hold that the complained of retaliation cannot merely be "adverse," it must be "materially adverse." (Although the matter is not free from doubt, we take it that the government uses the term "materially" in its ordinary meaning of "to a significant extent or degree."[6]) If "materially adverse" requires injury or change more serious than what is

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[5] That is consistent with our proposed literal reading of section 704(a), which requires discrimination "against" the plaintiff. That is the meaning of "adverse" in ordinary English. Webster's Third New International Dictionary, 31 (1981) (defining "adverse" as "in opposition to one's interests," "unfavorable," "detrimental").

[6] Webster's Third New International Dictionary, 1392 (1981).

merely "adverse," it makes no sense to assert that only proof of "materially adverse" action will "satisfy" the requirement of "adverse" action.

This additional requirement of "material" adversity would be unwarranted even in an action under section 703. Section 703(a)(2) forbids an employer, inter alia,

> to limit . . . his employees . . . in any way which would . . . *adversely* affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (emphasis added). When Congress chose to use the term "adverse" in Title VII,[7] it emphatically did not include the additional requirement that the discriminatory action be "materially" adverse. That choice is assuredly a deliberate one; the term "adverse" is used more than 1300 times in the United States Code, but the more limited phrase "materially adverse" is utilized in only seven federal statutes.[8]

The government acknowledges that its reading of section 704(a) would in some circumstances permit an employer to engage in retaliatory actions that "would deter employees from charging discrimination." (U.S. Br. 19). On the government's view, any objection that an employer would thus be able – by using properly crafted retaliatory techniques – to prevent workers from complaining to the EEOC, testifying at trial, or objecting to sexual harassment, is "tantamount to a policy objection to

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[7] The term adverse, not modified by "materially," is also in section 703(c)(2).

[8] 11 U.S.C. §§ 101, 702; 12 U.S.C. §§ 1843, 1844; 15 U.S.C. §§ 78q, 78eee; 16 U.S.C. § 6205.

the line drawn by Congress." (U.S. Br. 20). But in its brief in *Robinson v. Shell Oil Co.*, the United States saw no such line limiting the reach of the section 704(a) ban on retaliation, which the Solicitor General correctly characterized as "unconditional."

> At a minimum the statute is ambiguous. . . . [I]n construing a statute, the Court should adopt that sense of its words which best promotes the policy and objectives of the legislature. *[King v.] St. Vincent's Hospital*, [502 U.S. 215,] 221 [(1991)]. . . . Strong protection from retaliation toward employees who complain to, or cooperate with the EEOC is essential to the effectiveness of Title VII. . . .[9]

As the government correctly recognized in this earlier brief, the policy of protecting employees from retaliation – all retaliation – is the policy of the Congress itself.

II. THE GOVERNMENT'S PROPOSED INTERPRETATION OF SECTION 704(a) FAILS TO PROVIDE A CLEAR AND PREDICTABLE STANDARD FOR THE LOWER COURTS

The government suggests its proposed interpretation of section 704(a) will provide the lower courts with "a workable, objective, and uniform standard." (U.S. Br. 20). To the contrary, far from being workable, objective or uniform, what the government proposes is hardly a standard at all.

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[9] *Robinson v. Shell Oil Co.*, No. 95-1376, Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, 16.

The government offers three quite different characterizations of its proposal. First, it asserts that a plaintiff must show that the retaliatory act resulted in a "materially significant disadvantage." (U.S. Br. 22). This seems congruent with the phrase "materially adverse." Since both "materially" and "significant" mean "important," this formulation requires something like a very important disadvantage. Paying someone less because she complained about sexual harassment would be a disadvantage (or adverse); a pay cut of $100 a week might be materially adverse, but a smaller pay cut (say, $10) might not. A retaliatory transfer to a more distant office might be materially significant (at a distance of perhaps 50 miles), materially adverse (perhaps 25 miles) or small enough to be legal (possibly at 10 miles). To apply this type of standard, the lower courts would have to develop some sort of rating system to evaluate the comparative disadvantageousness of different acts of retaliation. How adverse a retaliatory act is would at times depend on the circumstances of the employee. For example, if an employer transferred all women who complained about sexual harassment at its Bethesda store to a store in Annapolis, that would be materially (perhaps even materially significantly) adverse for workers who lived in Bethesda, not at all adverse for a worker who happened to live in Annapolis, and only slightly adverse for a worker who lived in between the two cities but closer to Bethesda.

That, however, is not the government's only formulation; indeed, it is not the formulation it proposes to use in the instant case. Elsewhere in its brief, the United States proposes that the legality of a retaliatory act should turn on whether it constitutes a "significant change" in responsibilities, working conditions or benefits. (U.S. Br. 21, 27,

28). Under this approach, it would not matter *how* adverse the impact of that change was, so long as the change itself was "significant." Thus if a supermarket retaliated against a butcher by reassigning her to work as a cashier, there would be an almost total change in responsibilities, but the worker might find that change only slightly (or, perhaps, not at all) disadvantageous. Application of this approach would require the courts to develop a system for rating the significance of changes in responsibilities (e.g., how much of the employee's time was now devoted to different tasks, and how different those tasks were), working conditions (changes in location, hours, temperature), or benefits (alterations of wages, pension contributions, flex time). The government suggests that this "significant change in responsibilities" test, not the "materially significant disadvantage" test, should be used here. (U.S. Br. 27-28). Its proposed analysis turns solely on the alteration in White's work responsibilities, not on how adverse those changes were for her.

Third, the government explains that the controlling question is about the *type* of harm the employer caused. Retaliation is materially adverse if it brings about "objectively tangible harm," but not if it causes "[p]urely subjective injuries." (U.S. Br. 23). The meaning of this distinction (and of this alternative explanation of "materially adverse") is not entirely clear. The government may intend to bar only claims based on purely idiosyncratic employee preferences, such as a worker who claims he was retaliated against by being assigned to work in an office painted yellow, his least favorite color. That would rule out relatively few retaliation claims. On the other hand, perhaps the government means that there must be an economic harm, such as lost wages or medical expenses; that would

exclude many of the cases for which Congress amended Title VII to authorize awards of compensatory damages.

The United States does not ask this Court at this time to decide among these (or possibly other) glosses on the exceedingly malleable phrase "materially adverse." Nor does the government suggest that the Court itself should in this case begin to develop the appropriate rating scheme (e.g., how far away can an employer transfer an employee without that action causing a "materially significant disadvantage" or constituting a "significant change?") All this, and perhaps more, is to be left to the lower courts. "In practice," the government surprisingly assures the Court, "the results under the various formulations may not vary greatly" from the EEOC "reasonably likely to deter" standard. (U.S. Br. 16 n.9).

Three things about the government's new position are actually clear. First, that interpretation would mean that there would be some forms of retaliation – serious enough to deter protected activity – that would be lawful under section 704(a). (In its briefs in the lower courts, the Department of Justice, as counsel for federal defendants, has identified a number of retaliatory practices which the government suggests are per se lawful).[10] Second, that interpretation would impose on the lower courts the

[10] Brief of Appellee, *McAdams v. Harvey*, No. 04-16263-AA (11th Cir.), 2005 WL 3147709 *5 ("a failure to receive a bonus . . . does not constitute a materially adverse action."); Brief of Appellee, *Webster v. Rumsfeld*, No. 04-1739 (4th Cir.), 2005 WL 2044700 *24 ("the loss of a bonus is not an adverse employment action where the employee is not automatically entitled to a bonus."); Brief of Appellee, *Smith v. Cohen*, No. 00-10199 (5th Cir.), 2000 WL 34214783 *36 (same); Brief of Appellee, *Groves v. Rubin*, No. 00-12113GG (11th Cir.), 2000 WL 34020498 *22 (same).

unenviable and potentially endless task of deciding from among an infinite variety of retaliatory tactics that are to be declared permissible under the law. Third, that interpretation cannot be reconciled with the language and purpose of section 704(a).

CONCLUSION

For the above reasons, the decision of the Sixth Circuit should be affirmed.

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REPLY BRIEF

Respondent Sheila White advances the extraordinary claim that an employer is subject to liability under § 704 of Title VII for *any* different and adverse treatment of a Title VII complainant, no matter how trivial or temporary. As both BNSF and the United States point out, White's position cannot be squared with the language, structure, or policies of the statute as a whole. Sections 703 and 704 are most naturally interpreted *in pari materia*. Each prohibits the same kind of discriminatory conduct, but creates a different form of protected class. Petr. Br. 14-21; U.S. Br. 7-12. Under both sections 703 and 704, the employer may be held liable (outside of hostile work-environment claims) only for "an official act of the enterprise" that causes "a significant change in employment status." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998). Under that standard, White concedes that "it is far from certain that respondent would prevail." Resp. Supp. Br. 1. Her concession is an understatement; none of the conduct at issue remotely satisfies the *Ellerth* standard.

1. White argues that the entire meaning of § 704 resides in two words: "discriminate against." She urges that those two words mean, in isolation, any adverse "'difference in treatment or favor,'" and thus employers incur Title VII liability for even the most trivial of acts by an employer's agent. Resp. Br. 5, 9. White unabashedly declares that Congress "chose[] to make a 'federal case' out of even minor acts of retaliation," *id.* at 15, for "all that the statute requires . . . is that the retaliatory act be 'against' the plaintiff." *id.* at 10.

White commits a cardinal error of statutory interpretation. This Court does not "construe statutory phrases in isolation," *United States* v. *Morton*, 467 U.S. 822, 828 (1984), but rather "'look[s] to the provisions of the whole law, and to its object and policy,'" *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989), to determine which among "permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest*

Assocs., Ltd., 484 U.S. 365, 371 (1988); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (Title VII text is to be interpreted in light of "the specific context in which that language is used, and the broader context of the statute as a whole").

Here, sections 703 and 704 are most naturally read *in pari materia*. Petr. Br. 14-21; U.S. Br. 7-12. White claims that Congress had to repeat *in haec verba* all of the "widely divergent language" of § 703 (Resp. Br. 14) in § 704 if it intended their prohibitions to be parallel. But "the natural inference is that Congress used the phrase 'discriminate against' [in § 704] as shorthand for the employment practices that it had previously identified as unlawful, if taken on the basis of race, color, religion, sex, or national origin." U.S. Br. 10. When (as here) closely related statutory provisions use the same terminology in shorthand form but without the same express limitations that appear in a preceding section, this Court has not hesitated to interpret the two statutes *in pari materia*, where that comports with statutory purposes.[1]

Not only does White give short shrift to interpreting the statute as a whole,[2] but also she effectively reads certain lan-

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[1] *See, e.g., City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-37 (2002); *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 545 (2002); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976). "The negative pregnant argument should not be elevated to the level of interpretive trump card." *Field* v. *Mans*, 516 U.S. 59, 67 (1995).

[2] Her only nod in the direction of analyzing statutory structure is to argue that "Congress circumscribed the Title VII prohibitions with eleven specific statutory exceptions," and purportedly "[o]nly a single exception applies to practices otherwise forbidden by section 704(a)." Resp. Br. 10-11. As an initial matter, this is incorrect. A number of the statutory exceptions apply to claims of discrimination "under this subchapter," which includes § 704(a), thus strengthening the inference that §§ 703 and 704 are to be construed *in pari materia*. *See, e.g.*, 42 U.S.C. §§ 2000e-1(b), 2000e-2(f), (g), (h), (k)(2) & (3), (n). In any event, Congress's decision to carve out certain exceptions that apply to only one form of § 703 discrimination—such as the right of religious educational institutions to hire persons of that religion, *id.* § 2000e-2(e)(2)—says nothing about the

guage out of the statute altogether. Even though § 704 appears in a statute devoted exclusively to discrimination in employment and prohibits employers from engaging in "an unlawful employment practice" of discriminating against persons engaged in protected activity, 42 U.S.C. § 2000e-3(a), White insists that § 704 "does not require an 'employment action.'" Resp. Br. 12. White dismisses the statutory term "unlawful employment practice" as a meaningless catchall phrase because this same phrase in both sections 703 and 704 also applies to unions, employment agencies, and joint labor-management committees. *Id.* White ignores that the prohibited "unlawful employment practices" by those entities address not all discrimination (*e.g.*, discrimination by a union in selecting a contractor to construct a union hall), but only that affecting employment rights and privileges: *i.e.*, discrimination regarding union membership and practices, employment opportunities and referrals, employer dealings, employee training, and applicant selection and testing. 42 U.S.C. §§ 2000e-2(b)-(d) & (l), 2000e-3. "That common usage is a specific manifestation of Congress's intent to tie the scope of the retaliation prohibition to Title VII's core prohibitions." U.S. Br. 11. Indeed, this inference is strengthened by this Court's recent conclusion that "retaliat[ion] against a person *because* he complains of sex discrimination ... constitutes intentional 'discrimination' 'on the basis of sex.'" *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) (Title IX).

Accordingly, nearly every court of appeals has rightly interpreted sections 703 and 704 in harmony, requiring that the plaintiff prove that employer discrimination constitutes a "'materially adverse change in the terms and conditions of plaintiff's employment.'" Pet. App. 10a (alteration omitted); *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (Alito, J.). This Court should do the same.[3]

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meaning of the general prohibition on discrimination in either section 703 or 704.

[3] Respondent overreaches in claiming that *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), is to the contrary. Resp. Br. 12-13. *Robinson* held

2. White insists that this standard must be rejected because it is not "to be found in [the] text of section 704(a)." Resp. Br. 11. But Title VII has been consistently interpreted in light of its purposes and policies to prohibit only objectively serious forms of discrimination. Thus, in cases involving sexual and racial harassment alleged to cause only psychological harm, this Court decided that the harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.'" *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and alteration omitted). The Court chose this standard because it "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The prevailing requirement of a materially adverse employment action likewise ensures that only objectively serious discrimination can give rise to liability.

3. White wrongly claims that her contrary construction is supported by other federal statutes. See Resp. Br. 20-23 & 1a-3a. White argues that, because there are 43 anti-retaliation statutes that use the phrase "discriminate against," and because those statutes "have the same salutary purpose" as Title VII, those other statutes demonstrate that § 704(a) operates "without limitation." *Id.* at 21-22.

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only that the term "employee" in Title VII includes former employees. 519 U.S. at 346; it did not opine on what employer conduct was necessary to find a violation of Title VII. *See Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692 (5th Cir. 2004). Indeed, *Robinson* reached that conclusion largely because only former employees would be entitled to a remedy for the ultimate change in employment status—namely, discharge. 519 U.S. at 342-43. *Robinson* is fully reconcilable with the adverse-employment-action standard. *See, e.g., Robinson*, 120 F.3d at 1301 n.15 (standard satisfied if "retaliatory conduct was related to his or her future employment and was serious enough to materially alter his or her future employment prospects or conditions").

White again evinces an unwillingness to examine the specifics of statutory language, structure, and policy. Some anti-retaliation statutes are on their face substantially broader than § 704(a). *E.g.*, 2 U.S.C. § 1317(a) ("[i]t shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against" an employee for engaging in protected conduct); 33 U.S.C. § 1367(a) ("[n]o person shall fire, or in *any other way* discriminate against" (emphasis added)). Other statutes are written less broadly, but have been given an expansive agency interpretation. Compare, *e.g.*, 42 U.S.C. § 5851(a)(1), with 29 C.F.R. §§ 24.1, 24.2(a). Yet, White would interpret 43 statutes (from the Sarbanes-Oxley Act to CERCLA) to be identical to Title VII, with no consideration for differences in texts, regulatory and judicial interpretations, and histories, much less their purposes.

Each statutory scheme is different. The NLRA, on which White places principal reliance, demonstrates the point. The NLRA's anti-retaliation provisions are much broader than § 704. The NLRA forbids the employer both "'(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in § 7 of the Act; .... [and] (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.'" *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 735 n.1 (1983) (original alteration omitted) (quoting 29 U.S.C. § 158(a)(1) and (4)). These provisions operate in tandem, as their broad language suggests, to

> guarantee that employees will be able to enjoy their rights secured by § 7 of the Act—including the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes—without fear of restraint, coercion, discrimination, or interference from their employer.

Id. at 735. Moreover, the NLRA is enforced administratively, not by civil action in court for compensatory and punitive damages and other relief. The NLRB, of course, is not bound

to interpret § 8(a)(4) consistently with Title VII, and has not done so; in questions arising under the NLRA, the Board is owed deference in defining discrimination "in light of [its] special competence in applying the general provisions of the [NLRA] to the complexities of industrial life." *Id.* at 742.[4] So too must Title VII be interpreted in light of its own language, structure, and purpose.

White's position is further refuted by the Americans With Disabilities Act. Like § 703(a) of Title VII, the ADA's primary anti-discrimination provision prohibits discrimination against protected-class members "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. The ADA's anti-retaliation provision not only prohibits discrimination against persons participating in enforcement proceedings (in parallel to § 704), but separately makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual" for having exercised ADA rights or assisted someone else in doing so. *Id.* § 12203(a) & (b). The separate prohibition against coercion, threats, intimidation, and interference in subsection 12203(b) makes clear that not every instance of differential treatment constitutes "discriminat[ion]" under subsection 12203(a). See *Brown* v. *City of Tucson*, 336 F.3d 1181, 1186-93 (9th Cir. 2003); *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 222-24 (2d Cir. 2001). Thus, many courts have properly held that § 12203(a) of the ADA (like § 704(a) of Title VII) refers only to retaliatory discrimination with regard to the terms and conditions of employment. *Mondzelewski* v. *Pathmark Stores*,

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[4] White's proposed standard is broader than the NLRB's construction of the NLRA. *See McKesson Drug Co.*, 337 N.L.R.B. 935, 936 (2002) (construing the prohibition on discrimination in section 8(a)(4) to require an "adverse employment action"); *Manor Care of Boynton Beach*, Case 12-CA-16227, 1998 WL 1984996 (N.L.R.B. Div. of Judges Apr. 17, 1998) ("It is logical that an 'adverse employment action' necessarily must affect job tenure or status, and affect it adversely.").

Inc., 162 F.3d 778, 788 (3d Cir. 1998); *Treglia* v. *Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002); *accord* U.S. Br. 15 n.3. White is wrong in claiming both that a prohibition of "discrimination" in federal retaliation statutes inevitably extends to any different and adverse treatment no matter how trivial,[5] and that the varying language, structures, histories, and policies of other federal statutes can be summarily ignored in favor of her policy preferences.

4. Not only is White's position at odds with the language and structure of Title VII as a whole, but her position is extreme and implausible. Her interpretation is so untenable that it is embraced by *none* of her amici (some of whom cling to the former, atextual EEOC deterrence standard that the United States has now disavowed, U.S. Br. 15 n.4). It defies belief that Congress intended any trivial differential treatment by a corporate agent to state a claim of discrimination under § 704, while it restricted employer liability for the most invidious forms of racial, ethnic, sex, and religious discrimination only to materially adverse actions affecting the terms and conditions of employment. Petr. Br. 17; U.S. Br. 14-15.

Nor is there force to White's rhetoric that giving § 704 its plain meaning would result in "judicially approved methods of retaliation." Resp. Br. 24. The same objection can be raised whenever a court finds congressional intent to restrict the conduct that is actionable. There is no presumption that whenever Congress passes a remedial statute, it seeks to eliminate every vestige of unwanted conduct. In forgoing or restricting a remedy, Congress takes into account the severity of the harms, the costs of regulation and litigation, the risks of overdeterrence, and the administrability of a standard. *Com-*

[5] White is also incorrect in asserting that "[v]irtually all of these [anti-retaliation] statutes" have no "limitation as to the type of retaliatory act." Resp. Br. 22. Some statutes, unlike § 704(a) and § 12203(a) of the ADA, do not have an antecedent provision (such as sections 703(a) and 12112(a)) upon which to rely, and therefore contain an explicit terms-and-conditions limitation. *E.g.*, 12 U.S.C. §§ 1441a(q)(1), 1790b, 1831j; 20 U.S.C. § 3608; 31 U.S.C. § 5328(a); 49 U.S.C. § 31105(a).

plete Auto Transit, Inc. v. *Reis*, 451 U.S. 401, 416 (1981); *Landgraf* v. *USF Film Prods., Inc.*, 511 U.S. 244, 286 (1994). So, here, no form of retaliation is "immunized" from Title VII by the correct standard. Absent a tangible employment action, Congress simply did not provide a federal claim unless the employer's conduct reaches a sufficient level of severity to create a hostile work environment altering the conditions of employment. Petr. Br. 32; U.S. Br. 13.

White's assurances that her standard would not open the floodgates of trivial litigation are unavailing. She trumpets the requirement that the agent must have discriminated "against" the plaintiff, but by her definition a claim may be brought to trial by anyone alleging that the supervisor or co-worker intended to treat the plaintiff adversely in any way—hardly a brake on frivolous litigation. Resp. Br. 17. White also suggests that the employer might have an agency defense if the offending co-worker or supervisor did not use agency authority and "was motivated only by personal pique." *Id.* But the converse is that in the common occurrences where the "hostile remarks, dirty looks, ostracism" and the like occur while the supervisor or co-worker is acting in the scope of employment (*e.g.*, distributing daily work tasks), or if they are intended to serve the purposes of the employer, Title VII liability will attach under White's theory. *Id.* This is contrary to this Court's admonition that Title VII does not create a "general civility code." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Most significantly, decisions at the very core of daily supervisory responsibility—such as where employees will work, when lunch breaks will be taken, and which employee will do what tasks—will always be actionable under White's theory even though they cause no economic harm and are neither severe nor pervasive.

White next asserts that there is a pragmatic deterrent that many plaintiffs may face summary judgment on the question of fact of damage. Resp. Br. 18. But the proof requirement for nonpecuniary damage is not demanding; courts routinely

hold that testimony of the plaintiff alone without any medical evidence may suffice. *E.g.*, *Ledbetter* v. *Alltel Corp. Servs., Inc.*, 437 F.3d 717, 725 (8th Cir. 2006); cf. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). Thus, many plaintiffs will survive summary judgment by alleging *some* humiliation, distress, or fear of job insecurity caused by the alleged conduct.[6]

The severe dilution of the § 704 standard proposed by White would unduly harm employers and burden the federal courts. Even under the prevailing materially adverse employment action standard, § 704 retaliation claims nearly doubled from 1992 to 2005 at a time when § 703 claims were largely unchanged; approximately 30% or more of Title VII plaintiffs now file § 704 claims.[7] These statistics belie White's claim that the prevailing standard prevents vindication of legitimate claims—unless one accepts the fanciful notion that more than 30% of employers engage in retaliatory discrimination, and that the rate of such discrimination has more than doubled in the last decade. But, if this Court adopts an unprecedented national rule that any retaliatory act—even one fully remediated by higher management—can give rise to Title VII liability (and compensatory and punitive damages, and attorneys' fees), undoubtedly § 704 litigation will increase dramatically. Title VII plaintiffs are already adversarial to their employers and thus distrustful of their em-

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[6] White also doubts that many attorneys will take a case without the promise of large compensatory damages. Resp. Br. 19. But, given that practically any manifestation of a supervisor's or coworker's hostility because of the filing of a discrimination charge is an open-and-shut case of § 704 liability under White's theory, many attorneys will be happy to garner fees as a prevailing party and seek punitive damages—especially if, as is true here, the plaintiff is also litigating a § 703 claim against the employer.

[7] *See* EEOC, Charge Statistics FY 1992 Through FY 2005, *at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2006). The EEOC reports that section 704 claims are made on 26% of total charges, which are not limited to Title VII claims; a conservative proxy for the number of Title VII plaintiffs who file section 704 claims is the percentage of total charges that include a retaliation charge (30%). *Id.*

ployers' post-claim conduct. See *Jensen* v. *Potter*, 435 F.3d 444, 452 (3d Cir. 2006) ("some strain on workplace relationships is inevitable"). Some are also simply litigious. Plaintiffs often succeed in arguing that motive is a jury question, and thus it would be difficult to dispose of even the most frivolous claims by pretrial motion. Nearly every suit would have substantial settlement value. The Court should not adopt an open-ended standard inviting the boundless litigation that White (and her amici with their equally flawed "deterrence" standard) would embrace. Cf. *Domino's Pizza, Inc.* v. *McDonald*, 126 S. Ct. 1246, 1252 (2006) (making 42 U.S.C. § 1981 an "omnibus remedy for *all* racial injustice" would inappropriately "produce satellite section 1981 litigation of immense scope.").

5. The standard that should govern employer liability under sections 703 and 704 alike, except for hostile environment claims, is the tangible employment action standard in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998).[8] Under that standard, an employer may be liable for "an official act of the enterprise" that constitutes "*a significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761, 762 (emphasis added). White objects (Resp. Br. 28-30) that the precise issue in *Ellerth* concerned vicarious employer liability for harassment claims, a point BNSF freely acknowledges. Petr. Br. 22. The salient point is that, in resolving that question, the Court restated and "import[ed]" the prevailing materially adverse employment action standard under federal

[8] This Court coined the term "tangible employment action" to distinguish employment actions with "'adverse tangible, job consequences.'" *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 144 (2004) (quoting *Ellerth*, 524 U.S. at 747), from the intangible changes of work conditions caused by a hostile work environment, *Ellerth*, 524 U.S. at 752. Outside that context, the "tangible employment action" standard is the same as the materially adverse employment action standard. Pet. App. 10a n.1; *Davis* v. *Town of Lake Park, Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001).

law. 524 U.S. at 761. That standard should apply to claims under §§ 703 and 704 alike.

Much of White's analysis of *Ellerth* is an attack on this Court's standard. First, White insists that this Court's definition of "tangible employment action" is just "other language" in the opinion and not part of the holding. Resp. Br. 30. That is not so: The holding in *Ellerth* that an employer is liable for supervisory harassment culminating in a "tangible employment action," 524 U.S. at 765, obviously refers to the definition of that term previously given in the opinion and quoted above. In any event, it is not the precise holding, but this Court's explication of the standard, that is relevant here.

Second, White urges that this Court did not mean what it said in *Ellerth*, and that a "tangible employment action" broadly refers to any "actual exercise by a supervisor of his or her official authority in directing or affecting a subordinate." Resp. Br. 30. Although White needs such a standard to prevail, this Court did not equate "tangible employment action" with every directive or act of a supervisor within the scope of employment. Directing a subordinate to make a phone call or mail a letter is an exercise of official authority; it is not a tangible employment action within the meaning of *Ellerth*. That term, this Court said, refers to "a company act" that typically inflicts direct economic harm on the employee, is documented in company records, requires the imprimatur of the company and the use of internal processes, and is subject to higher management review and approval. *Ellerth*, 524 U.S. at 762.

The limited scope of the standard is confirmed by the conduct that this Court identified as outside the concept, such as a "demotion without change in pay, benefits, duties, or prestige," and "reassignment to [a] more inconvenient job." *Id.* at 761. Each of these is an exercise of official supervisory authority, but it is not a "tangible employment action." Furthermore, this Court emphasized that this standard applied not just to any change in employment status, but instead only to "*significant*" changes, including a "reassignment with *signifi-*

cantly different responsibilities, or a decision causing a *significant* change in benefits." *Id.* at 761 (emphasis added).[9]

White's last resort is to argue at length in her response (and in the extra pages to which she helps herself on the dubious claim of entitlement to a supplemental brief under this Court's Rule 25.5) that the *Ellerth* standard BNSF urges the Court to apply is impermissibly vague. Even overlooking the irony of such a criticism coming from a party who is arguing for no standard at all, or a standard based on the "restraint" of lawyers, White's attacks should go nowhere. Her contention that the term "status" presents many imponderables (Resp. Br. 37-40) is unavailing; that term is simply shorthand for the terms and conditions of employment, as distinct from any act of supervision. Nor is the word "significant" somehow hopelessly unworkable; judges and juries are asked all the time to make a finding of "significance" in determining criminal and civil liability.[10] Moreover, the same "problem" exists in the context of hostile environment harassment where the judge and jury must decide whether conduct is "abusive." That there may be some ambiguity in the standard is no reason to reject having any standard at all, as White proposes. See *Harris*, 510 U.S. at 24 (Scalia, J., concurring). Juries and courts will have no more difficulty, and probably less, determining whether a change in employment status is significant than in determining whether a work environment

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[9] White's reliance (Resp. Br. 30-31) on the Court's later use of the phrase "undesirable reassignment" in *Ellerth* is misplaced. The Court was simply giving a shorthand description of the language earlier in the opinion defining tangible employment action to include an adverse reassignment with a significant change in responsibilities.

[10] *See, e.g., Spector* v. *Norwegian Cruise Lines, Ltd.*, 125 S. Ct. 2169, 2177 (2005) (ADA defense requiring a showing that the plaintiff "would pose 'a significant risk to the health or safety of others'"); *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 570 (1999). For a small sample of federal statutes requiring fact findings of significance, *see, e.g.*, 12 U.S.C. § 1786(f)(1), 4631(a); 15 U.S.C. § 78u(d)(3)(B)(iii); 16 U.S.C. § 1371(a)(4)(C); 17 U.S.C. § 1201(b)(1)(B); 18 U.S.C. § 1033(a)(2); 19 U.S.C. § 1337(a)(3); 21 U.S.C. § 333(g)(1)(B); 33 U.S.C. § 1342(p)(2).

is "abusive."[11]

White's discomfort with the *Ellerth* standard is understandable. As she herself acknowledges, "it is far from certain that respondent would prevail" under that standard. Resp. Supp. Br. 1. Quite right; indeed, she clearly loses.

6. White's claim that she suffered a "significant change in employment status" when she was directed to perform track maintenance tasks that are the essential functions of her position rather than operate a forklift simply does not withstand scrutiny. The decision below rests on the fiction that BNSF "transferr[ed] White from her forklift operator job to a standard track laborer job," which is deemed a "demotion" to a "new position" requiring more arduous work and fewer qualifications. Pet. App. 25a. So do White's and the Government's arguments in support of the decision. White asserts that "forklift operator was a new job" and that she was "removed" from "the position of forklift operator." Resp. Br. 1. The Government (also citing only the opinion below, and not the record) insists that she was transferred from a "'forklift operator position'" to a "standard track laborer position." U.S. Br. 27. This is all doublespeak.

Respondent and her *amici* cannot simply erase basic and well-recognized distinctions between "duties," "jobs," and

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[11] Even if this Court declines to find that section 703 and 704 should be interpreted *in pari materia* for all purposes, it still must confront the question of what materiality standard best eliminates frivolous claims and comports with statutory purposes. Petitioner has explained why the amorphous, open-ended deterrence standard formerly advanced by the EEOC is flawed and unworkable. Petr. Br. 42-50. Even if respondent were correct that claims of nonworkplace retaliation by employer agents are independently actionable under section 704 and must be judged by a different standard, *see* Resp. Br. 12-13, no such conduct is at issue here. When employment-related actions are at stake, the *Ellerth* standard, which is rooted in objective and verifiable facts of employment (as opposed to jury speculation about psychological questions of probabilities of deterrence), *cf. Harris*, 510 U.S. at 24 (Scalia, J., concurring), captures the conduct that is most likely to have a substantial effect on Title VII enforcement.

"positions" that are fundamental not only to personnel management but also to the federal employment laws. *Duties* are the tasks that an employee may perform; "[a] *job* consists of related activities and duties" that form the unit of work; and "a *position* consists of different duties and responsibilities performed by only one employee." G. Bohlander & S. Snell, *Managing Human Resources* 92 (13th ed. 2004); see also R. Mathis & J. Jackson, *Human Resources Management* 160, 569-70 (11th ed. 2006) (defining "duty" and "job"). Forklift operation was one set of duties White performed for three months after being hired; her job at all times was Maintenance of Way Laborer; and she occupied the position of Maintenance of Way Laborer at the Tennessee Yard.

The distinction between the "duties" an employee may perform and the "position" she occupies is fundamental under federal employment law. An employer has an absolute prerogative in creating positions of employment (subject to any applicable duty of collective bargaining). The identity of the position that any employee holds is not an empty formalism; it defines the terms and conditions of employment and any rights against discrimination. Thus, under the ADA, as well as under Title VII, any plaintiff alleging discrimination in hiring, firing, promotions, or transfers must show that she is qualified for an actual position: *i.e.*, that she can "perform the essential functions of the *employment position* that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (Title VII plaintiff alleging discrimination in hiring must show, *inter alia*, that he "was qualified for a job for which the employer was seeking applicants"). The relevant employment position must be an "existing position" that the employer has already created. *Donahue* v. *Consolidated Rail Corp.*, 224 F.3d 226, 230 (3d Cir. 2000) (Alito, J.); *Willis* v. *Pacific Mar. Ass'n*, 244 F.3d 675, 681 (9th Cir. 2001).[12]

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[12] *Robinson* v. *Sappington*, 351 F.3d 317 (7th Cir. 2003), *cert. denied*, 542 U.S. 937 (2004), cited by White as a case approved by this Court,

There is no basis in law for disregarding the employment position White actually occupied, and positing a different "position" based on a subset of tasks she performed for a relatively short period. See, *e.g.*, *Anderson* v. *Coors Brewing Co.*, 181 F.3d 1171, 1176-1177 (10th Cir. 1999) (rejecting the claim that an employee's position was narrowed from temporary production operator to can sorter just because she spent most of her time on that task). White operated the forklift for *three months* (from June to September, 1997, Pet. App. 3a-4a)—not every day but only a "majority of the time," and while spending "a good bit of . . . time" on track maintenance duties "on a regular basis from the time [she was] first employed," such as oiling and cleaning the switches on the hundred or so tracks in the Tennessee Yard, II Tr. 194-96.[13] It is simply ludicrous to argue that she held "a forklift operator position" and was "demoted" by Brown to "a standard track laborer position." A law firm associate may spend a significant amount of time in a given year reviewing documents, but that does not make the position one of "document review lawyer," and an employee or applicant could not show that he was qualified for the associate position if he could only review documents, and not perform other essential lawyer functions that an associate may be called upon to do. The Sixth Circuit's approach to identifying an employee's position would wreak havoc with federal discrimination law, and indeed with the employer community subject to Title VII.

Resp. Br. 31 n.43, does not support her claim. There, a judicial clerk was officially "transferred" to a position working for a different judge. 351 F.3d at 336. Even then, the Seventh Circuit declined to decide whether the transfer alone was a tangible employment action, citing the existence of other factors. *Id.* at 337 n.13. Here there was no transfer, and *Sappington* does not hold that a mere change in a clerk's duties (from calendaring to filing) would be actionable.

[13] Respondent cites only her direct testimony that she "had never experienced working on the railroad tracks," Resp. Br. 2 & n.8 (quoting I Tr. 86-87). She is not entitled to ignore her testimony on cross-examination quoted above retracting that claim.

Once the fiction of "transfer" is exposed, it is clear that the alteration of White's duties does not meet the *Ellerth* standard. This was not "a *significant* change in employment status," because a change in job tasks within an existing position does not typically inflict direct economic harm on the employee or require the imprimatur of the company and the use of internal processes, nor is it generally documented in company records or subject to higher management review and approval. 524 U.S. at 761-62. While a "*reassignment* with significantly different responsibilities" would be actionable, *id.* (emphasis added), there was simply no reassignment here. Petr. Br. 25 & n.5; *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1164 (10th Cir. 1999) ("The 're' in 'reassignment" implies the presence of an existing assignment, *i.e.*, an existing job, that the person holds," and assignment to a new position) (construing ADA regulations).

Even if White's actual position could be ignored and the change in duties somehow deemed a "reassignment," she was not given "*significantly* different responsibilities," 524 U.S. at 761 (emphasis added). Being asked to perform track maintenance tasks that are core responsibilities of her job (and ones that by her own testimony she and others performed "on a regular basis," II Tr. 194-95), hardly shows a dramatic shift in responsibilities. Petr. Br. 28. White claims that track maintenance is harder and dirtier than forklift operation, but "reassignment to [a] more inconvenient job [is] insufficient" to create liability. *Ellerth*, 524 U.S. at 761.

White rejoins that *Ellerth* cannot have this meaning because Title VII should not permit task assignments on the basis of race or sex. Resp. Br. 33. BNSF fully agrees that any kind of workplace discrimination is deplorable, but Congress limited Title VII liability to more serious conduct that materially affects the terms and conditions of employment, *Meritor*, 477 U.S. at 67, in part to prevent undue intrusion upon management prerogatives. Petr. Br. 30-32. As "with any rule of law which attempts to reconcile fundamentally antagonistic social

policies, there may be occasional instances of actual injustice which go unredressed," but "that price [is] a necessary one to pay for the greater good." *Barr* v. *Matteo*, 360 U.S. 564, 576 (1959). The substantially heightened litigation risk arising from White's favored rule will chill employers in the exercise of the ordinary management prerogative of assigning work, forcing them to treat Title VII plaintiffs with kid gloves and shielding them from normal and legitimate management responses. That cannot be the result Congress intended.

7. Similarly unavailing is White's claim that her judgment can be sustained on the basis of the vacated suspension. White asks this Court to overrule a line of appellate court cases holding that "[a]n employer may cure an adverse employment action . . before that action is the subject of litigation," *Taylor* v. *Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003). Resp. Br. 40-42; *accord* U.S. Br. 25.[14]

That stance runs afoul of this Court's repeated admonition that Title VII "aims chiefly, 'not to provide redress but to avoid harm,'" *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545 (1999), and that "the preferred means for achieving this goal" is "[c]ooperation and voluntary compliance." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Indeed, the rationale for limiting liability to "an official act of

[14] Respondent seeks to dodge BNSF's challenge on this score with the baseless claim that it is outside the question presented. Resp. Br. 44-46. She wrongly claims that BNSF now disclaims responsibility for the suspension. BNSF has never stated that Brown was not its agent in suspending White; our consistent position is that the suspension was not the employer's final decision on her discipline and thus not a tangible employment action. *Id.* at 44 n.54. Similarly, it is false to claim that BNSF is taking a new position that the initial discipline was a suspension pending investigation. That was the testimony at trial, and it is how White herself characterized the initial discipline in both the EEOC charge and the complaint in this case! Petr. Br. 33. Finally, her claim that there should have been factual determinations below on the meaning of the CBA is baffling. Contract construction is a question of law (*Goddard* v. *Foster*, 84 U.S. (17 Wall.) 123, 142 (1872)), and this issue relates to the legal questions of the applicability of *Ellerth*. These are not fact issues for the jury.

the enterprise, a company act" subject to management review is that these "are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control," *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004), and thus it is fair to the employer to impose liability if it does not correct such actions. But if the employer corrects and wholly vacates those actions, there can be no liability, for there would be no "*employer-sanctioned* adverse action *officially changing* her employment status or situation." *Id.* at 134 (emphasis added).

Indeed, in hostile work environment claims not involving tangible employment actions, this Court has recognized a defense to liability "if the employer exercise[s] reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765. Where liability depends upon a tangible employment action—"a company act," *id.* at 762—the result should not differ when the company provides a mechanism for management to investigate the facts and review the supervisor's decision, and then renders the company's final decision *in favor* of the employee.

This is not a question of an employer gaining "immunity from liability from other forms of relief provided by Title VII," as White contends. Resp. Br. 42. The question here is what conduct can be the basis for liability; that conduct is BNSF's final decision on discipline. White is entitled to no relief at all for the conduct. Nor is the cure "partial" because BNSF did not top off the back pay with an allowance for White's claimed emotional distress. The question is whether the adverse employment action was cured. White's employment status was restored to the *status quo ante* when BNSF reinstated her with full back pay and expunged the suspension from her record.[15]

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[15] This interpretation of section 704 liability is buttressed by the unavailability of relief for such conduct under the original Civil Rights Act. The claim (U.S. Br. 26) that someone in White's circumstance could have brought an action for interest or injunction under the original Act is un-

Nor do this Court's statute-of-limitations cases suggest a contrary result; indeed, they support petitioner. Petr. Br. 36-38. The CBA plainly provides that an employee may file a request for investigation of discipline and "[*a*] *decision will be rendered by the Carrier* within 10 days after completion of the investigation." CBA R. 91(b)(5) (JA 57) (emphasis added). It is only after such decision—which is "the official act of the enterprise," *Ellerth*, 524 U.S. at 762—that an employee "dissatisfied" with the Carrier's "decision" would grieve it under the separate article governing grievances. CBA R. 91(b)(7)-(8) (JA 57). It is the AFL-CIO (Br. 15), not petitioner, that misleads the Court in claiming that a request for investigation is a grievance; the plain language of the agreement is to the contrary.[16]

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founded. *Loeffler* v. *Frank*, 486 U.S. 549, 557-58 (1988), holds only that prejudgment interest is available on a *judgment* of back pay, and no injunction could issue absent a showing that the employer is likely to repeat the violation. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102-03 (1983). The 1991 Civil Rights Act expanded available remedies for unlawful conduct, but did not create new actionable conduct. Petr. Br. 36; *cf. Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001) ("In 1991, ... Congress further expanded the remedies ....").

[16] The AFL-CIO is also wrong to contend that the BNSF agreement—which it quotes selectively—is substantially different from the CBA here and would not have resulted in suspensions without pay before the final decision on discipline after investigation. AFL-CIO Br. 15-16. That agreement specifically provides that an employee may be "held out of service" without pay pending investigation, BNSF CBA R. 40.B, G (Reply App.); "[a] decision shall be rendered within thirty (30) days following the investigation," *id.* 40.D; and (in the part omitted by the AFL-CIO) an employee may file a grievance contesting that decision under the separate Rule 42 governing grievances, *id.* 40.H, 42. As relevant here, the Frisco and BNSF CBAs differ only in that in the former the employee requests the investigation, and in the latter it happens automatically unless waived. *See id.* 40.F. Thus, the industry norm, AFL-CIO Br. 15-16, is that a disciplinary decision after investigation is prior to the filing of grievances, and the union cannot transform a request for investigation and decision into a grievance. Furthermore, the AFL-CIO is wrong in its suggestion that insubordination is not typically a basis for suspension pending investigation. Although as here, the employer might determine after investigation that

Nothing in Title VII justifies a rule whereby an employer that acts responsibly, as BNSF did, should nonetheless bear liability for the acts of supervisors it corrects, with no adverse effect on the employment status of the plaintiff. The rule below would chill the necessary business practice of suspending without pay, Petr. Br. 40, as well as every other practice where supervisors exercise official authority subject to higher level review.[17] It merely begs the question to assert that supervisors should simply not discriminate in issuing suspensions (U.S. Br. 26; Resp. Br. 47), when in White's view whether a decision is discriminatory can be answered in most cases with assurance only by a jury verdict. The point is that employers will be powerfully deterred from engaging in beneficial practices if it means running substantial and unwarranted *risks* of liability and high litigation costs regardless of the ultimate outcome. See, *e.g.*, *Franchitti* v. *Bloomberg, L.P.*, 411 F. Supp. 2d 466, 467 (S.D.N.Y. 2006) (employer spends $1.3 million defending through a trial a former employee's Title VII claim that the trial judge found to be utterly baseless and fraudulent).

CONCLUSION

The judgment should be reversed.

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suspension was unwarranted, as a class of conduct insubordination — particularly insubordination in the field — is a serious infraction that often justifies suspension without pay pending investigation. *See, e.g.*, NRAB Second Div. Award No. 13830 (Apr. 1, 2005); NRAB Third Div. Award No. 32393 (Dec. 30, 1997) (available by search at www.nmb.gov).

[17] Temporary suspensions *with pay*, even if corrected, would apparently also create liability under White's proposed interpretation of *Ellerth* since they change employment status; the employee may experience some temporary adverse effects from being removed from service, *DeLaughter* v. *United States Postal Serv.*, 3 F.3d 1522, 1524 (Fed. Cir. 1993); and an employee may plausibly claim (and prove with only her testimony) emotional distress from even a paid suspension.

Respectfully submitted,

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APPENDIX

BNSF

[LOGO]

AGREEMENT

BETWEEN

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

AND ITS EMPLOYEES
REPRESENTED BY THE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

[LOGO]

Effective September 1, 1982

Updated December, 2002

Form 12619

* * * *

Rule 40. INVESTIGATIONS AND APPEALS

A. An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.

B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor.

C. At least five (5) days advance written notice of the investigation shall be given the employe and the appropriate local organization representative, in order that the employe may arrange for representation by a duly authorized representative or an employe of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employe involved.

D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employe, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employe. If not effected within five (5) calendar days, or if employe is called back to

service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.

E. The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.

F. The investigation provided for herein may be waived by the employe provided that any discipline assessed is confirmed in writing in the presence of his duly authorized representative and agreed to by the proper officer of the Carrier.

G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

H. The provisions of Rule 42 shall be applicable to the filing of claims and to appeals in discipline case. [See Appendix JJ for alternative expedited arbitration procedures]

I. The date for holding an investigation may be postponed if mutually agreed to by the Company and the employe or his duly authorized representative. If there is a change in the location of the investigation, the employe and his duly authorized representative will be notified.

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe shall be considered as having been dismissed.

K. If an employe who has been discharged for cause is later reinstated, without having been found blameless, and his former position has been bid in by another employe on regular bulletin, the reinstated employe will displace the youngest assigned man in his own rank, unless otherwise agreed between the General Chairman and the Company.

* * * *

Rule 42 TIME LIMIT ON CLAIMS

A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.

B. If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Company shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Company designated for that purpose.

C. The requirements outlined in Sections A and B of this rule pertaining to appeal by the employee and decision by the Company, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Company to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless, within nine (9) months from the date of said officer's decision pro-

ceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3, Second, of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) months' period herein referred to.

D. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

E. This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievance for and on behalf of the employes it represents.

F. This Agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Company.

G. This rule shall not apply to requests for leniency.

* * * *

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BURLINGTON NORTHERN & SANTA FE RAILWAY CO. *v.* WHITE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05–259. Argued April 17, 2006—Decided June 22, 2006

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on "race, color, religion, sex, or national origin," 42 U. S. C. §2000e–2(a), and its anti-retaliation provision forbids "discriminat[ion] against" an employee or job applicant who, *inter alia*, has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. §2000e–3(a). Respondent White, the only woman in her department, operated the forklift at the Tennessee Yard of petitioner Burlington Northern & Santa Fe Railway Co. (Burlington). After she complained, her immediate supervisor was disciplined for sexual harassment, but she was removed from forklift duty to standard track laborer tasks. She filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming that the reassignment was unlawful gender discrimination and retaliation for her complaint. Subsequently, she was suspended without pay for insubordination. Burlington later found that she had not been insubordinate, reinstated her, and awarded her backpay for the 37 days she was suspended. The suspension led to another EEOC retaliation charge. After exhausting her administrative remedies, White filed an action against Burlington in federal court claiming, as relevant here, that Burlington's actions in changing her job responsibilities and suspending her for 37 days amounted to unlawful retaliation under Title VII. A jury awarded her compensatory damages. In affirming, the Sixth Circuit applied the same standard for retaliation that it applies to a substantive discrimination offense, holding that a retaliation plaintiff must show an "adverse employment action," defined as a "materially adverse change in the terms and conditions" of employment. The Circuits have come to different conclusions about

Syllabus

whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.

Held:

1. The anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. The language of the substantive and anti-retaliation provisions differ in important ways. The terms "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" explicitly limit the substantive provision's scope to actions that affect employment or alter workplace conditions. The anti-retaliation provision has no such limiting words. This Court presumes that, where words differ as they do here, Congress has acted intentionally and purposely. There is strong reason to believe that Congress intended the differences here, for the two provisions differ not only in language but also in purpose. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their status, while the anti-retaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. To secure the first objective, Congress needed only to prohibit employment-related discrimination. But this would not achieve the second objective because it would not deter the many forms that effective retaliation can take, therefore failing to fully achieve the anti-retaliation provision's purpose of "[m]aintaining unfettered access to statutory remedial mechanisms," *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 346. Thus, purpose reinforces what the language says, namely, that the anti-retaliation provision is not limited to actions affecting employment terms and conditions. Neither this Court's precedent nor the EEOC's interpretations support a contrary conclusion. Nor is it anomalous to read the statute to provide broader protection for retaliation victims than for victims of discrimination. Congress has provided similar protection from retaliation in comparable statutes. And differences in the purpose of the two Title VII provisions remove any perceived "anomaly," for they justify this difference in interpretation. Pp. 6–12.

2. The anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon* v. *Gonzales*, 438 F. 3d 1211, 1219. The Court refers to *material* adversity to separate significant from trivial

Syllabus

harms. The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms by prohibiting employer actions that are likely to deter discrimination victims from complaining to the EEOC, the courts, and employers. *Robinson, supra,* at 346. The Court refers to a *reasonable* employee's reactions because the provision's standard for judging harm must be objective, and thus judicially administrable. The standard is phrased in general terms because the significance of any given act of retaliation may depend upon the particular circumstances. Pp. 12–15.

3. Applying the standard to the facts of this case, there was a sufficient evidentiary basis to support the jury's verdict on White's retaliation claim. Contrary to Burlington's claim, a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. Almost every job category involves some duties that are less desirable than others. That is presumably why the EEOC has consistently recognized retaliatory work assignments as forbidden retaliation. Here, the jury had considerable evidence that the track laborer duties were more arduous and dirtier than the forklift operator position, and that the latter position was considered a better job by male employees who resented White for occupying it. Based on this record, a jury could reasonably conclude that the reassignment would have been materially adverse to a reasonable employee. Burlington also argues that the 37-day suspension without pay lacked statutory significance because White was reinstated with backpay. The significance of the congressional judgment that victims of intentional discrimination can recover compensatory and punitive damages to make them whole would be undermined if employers could avoid liability in these circumstances. Any insufficient evidence claim is unconvincing. White received backpay, but many reasonable employees would find a month without pay a serious hardship. White described her physical and emotional hardship to the jury, noting that she obtained medical treatment for emotional distress. An indefinite suspension without pay could well act as a deterrent to the filing of a discrimination complaint, even if the suspended employee eventually receives backpay. Thus, the jury's conclusion that the suspension was materially adverse was reasonable. Pp. 15–18.

364 F. 3d 789, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. ALITO, J., filed an opinion concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–259

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER *v.* SHEILA WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 22, 2006]

JUSTICE BREYER delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin." Pub. L. 88–352, §704, 78 Stat. 257, as amended, 42 U. S. C. §2000e–2(a). A separate section of the Act—its anti-retaliation provision—forbids an employer from "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. §2000e–3(a).

The Courts of Appeals have come to different conclusions about the scope of the Act's anti-retaliation provision, particularly the reach of its phrase "discriminate against." Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?

We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are

related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

I

A

This case arises out of actions that supervisors at petitioner Burlington Northern & Santa Fe Railway Company took against respondent Sheila White, the only woman working in the Maintenance of Way department at Burlington's Tennessee Yard. In June 1997, Burlington's roadmaster, Marvin Brown, interviewed White and expressed interest in her previous experience operating forklifts. Burlington hired White as a "track laborer," a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Soon after White arrived on the job, a co-worker who had previously operated the forklift chose to assume other responsibilities. Brown immediately assigned White to operate the forklift. While she also performed some of the other track laborer tasks, operating the forklift was White's primary responsibility.

In September 1997, White complained to Burlington officials that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in the Maintenance of Way department. Joiner, White said, had also made insulting and inappropriate remarks to her in front of her male colleagues. After an internal investigation, Burlington suspended Joiner for 10 days and ordered him to attend a sexual-harassment training ses-

sion.

On September 26, Brown told White about Joiner's discipline. At the same time, he told White that he was removing her from forklift duty and assigning her to perform only standard track laborer tasks. Brown explained that the reassignment reflected co-worker's complaints that, in fairness, a "'more senior man'" should have the "less arduous and cleaner job" of forklift operator. 364 F. 3d 789, 792 (CA6 2004) (case below).

On October 10, White filed a complaint with the Equal Employment Opportunity Commission (EEOC or Commission). She claimed that the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for her having earlier complained about Joiner. In early December, White filed a second retaliation charge with the Commission, claiming that Brown had placed her under surveillance and was monitoring her daily activities. That charge was mailed to Brown on December 8.

A few days later, White and her immediate supervisor, Percy Sharkey, disagreed about which truck should transport White from one location to another. The specific facts of the disagreement are in dispute, but the upshot is that Sharkey told Brown later that afternoon that White had been insubordinate. Brown immediately suspended White without pay. White invoked internal grievance procedures. Those procedures led Burlington to conclude that White had *not* been insubordinate. Burlington reinstated White to her position and awarded her backpay for the 37 days she was suspended. White filed an additional retaliation charge with the EEOC based on the suspension.

B

After exhausting administrative remedies, White filed this Title VII action against Burlington in federal court. As relevant here, she claimed that Burlington's actions—(1) changing her job responsibilities, and (2) suspending

her for 37 days without pay—amounted to unlawful retaliation in violation of Title VII. §2000e–3(a). A jury found in White's favor on both of these claims. It awarded her $43,500 in compensatory damages, including $3,250 in medical expenses. The District Court denied Burlington's post-trial motion for judgment as a matter of law. See Fed. Rule Civ. Proc. 50(b).

Initially, a divided Sixth Circuit panel reversed the judgment and found in Burlington's favor on the retaliation claims. 310 F. 3d 443 (2002). The full Court of Appeals vacated the panel's decision, however, and heard the matter en banc. The court then affirmed the District Court's judgment in White's favor on both retaliation claims. While all members of the en banc court voted to uphold the District Court's judgment, they differed as to the proper standard to apply. Compare 364 F. 3d, at 795–800, with *id.*, at 809 (Clay, J., concurring).

II

Title VII's anti-retaliation provision forbids employer actions that "discriminate against" an employee (or job applicant) because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." §2000e–3(a). No one doubts that the term "discriminate against" refers to distinctions or differences in treatment that injure protected individuals. See *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 174 (2005); *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 244 (1989) (plurality opinion); see also 4 Oxford English Dictionary 758 (2d ed. 1989) (def. 3b). But different Circuits have come to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.

Some Circuits have insisted upon a close relationship between the retaliatory action and employment. The

Sixth Circuit majority in this case, for example, said that a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions" of employment. 364 F. 3d, at 795 (internal quotation marks omitted). The Sixth Circuit has thus joined those Courts of Appeals that apply the same standard for retaliation that they apply to a substantive discrimination offense, holding that the challenged action must "resul[t] in an adverse effect on the 'terms, conditions, or benefits' of employment." *Von Gunten* v. *Maryland*, 243 F. 3d 858, 866 (CA4 2001); see *Robinson* v. *Pittsburgh*, 120 F. 3d 1286, 1300 (CA3 1997). The Fifth and the Eighth Circuits have adopted a more restrictive approach. They employ an "ultimate employment decisio[n]" standard, which limits actionable retaliatory conduct to acts "'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern* v. *Eastman Kodak Co.*, 104 F. 3d 702, 707 (CA5 1997); see *Manning* v. *Metropolitan Life Ins. Co.*, 127 F. 3d 686, 692 (CA8 1997).

Other Circuits have not so limited the scope of the provision. The Seventh and the District of Columbia Circuits have said that the plaintiff must show that the "employer's challenged action would have been material to a reasonable employee," which in contexts like the present one means that it would likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Washington* v. *Illinois Dept. of Revenue*, 420 F. 3d 658, 662 (CA7 2005); see *Rochon* v. *Gonzales*, 438 F. 3d 1211, 1217–1218 (CADC 2006). And the Ninth Circuit, following EEOC guidance, has said that the plaintiff must simply establish "'adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'" *Ray* v. *Henderson*, 217 F. 3d 1234, 1242–1243 (CA9 2000). The concurring judges below would have applied this last mentioned standard. 364 F. 3d, at

809 (opinion of Clay, J.).

We granted certiorari to resolve this disagreement. To do so requires us to decide whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace. And we must characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope.

A

Petitioner and the Solicitor General both argue that the Sixth Circuit is correct to require a link between the challenged retaliatory action and the terms, conditions, or status of employment. They note that Title VII's substantive anti-discrimination provision protects an individual only from employment-related discrimination. They add that the anti-retaliation provision should be read *in pari materia* with the anti-discrimination provision. And they conclude that the employer actions prohibited by the anti-retaliation provision should similarly be limited to conduct that "affects the employee's 'compensation, terms, conditions, or privileges of employment.'" Brief for United States as *Amicus Curiae* 13 (quoting §2000e–2(a)(1)); see Brief for Petitioner 13 (same).

We cannot agree. The language of the substantive provision differs from that of the anti-retaliation provision in important ways. Section 703(a) sets forth Title VII's core anti-discrimination provision in the following terms:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) *to fail or refuse to hire or to discharge* any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin; or

> "(2) to limit, segregate, or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin." §2000e–2(a) (emphasis added).

Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:

> "It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." §2000e–3(a) (emphasis added).

The underscored words in the substantive provision—"hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee"—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision. Given these linguistic differences, the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. See, *e.g.*, *Pasquantino* v. *United States*, 544 U. S. 349, 355, n. 2 (2005); *McFarland* v. *Scott*, 512 U. S. 849, 858 (1994); *Sullivan* v. *Everhart*, 494 U. S. 83, 92 (1990). Rather, the question is whether Congress intended its different words to make a legal difference. We normally presume that, where words differ as they differ here, "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*,

464 U. S. 16, 23 (1983).

There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800–801 (1973). The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments," *id.*, at 800, would be achieved were all employment-related discrimination miraculously eliminated.

But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. See, *e.g.*, *Rochon* v. *Gonzales*, 438 F. 3d, at 1213 (FBI retaliation against employee "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and

his wife"); *Berry* v. *Stevinson Chevrolet*, 74 F. 3d 980, 984, 986 (CA10 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 346 (1997).

Thus, purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. Cf. *Wachovia Bank, N. A.* v. *Schmidt*, 546 U. S. ___ (2006) (slip op., at 14) (rejecting statutory construction that would "trea[t] venue and subject-matter jurisdiction prescriptions as *in pari materia*" because doing so would "overloo[k] the discrete offices of those concepts").

Our precedent does not compel a contrary conclusion. Indeed, we have found no case in this Court that offers petitioner or the United States significant support. *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998), as petitioner notes, speaks of a Title VII requirement that violations involve "tangible employment action" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*, at 761. But *Ellerth* does so only to "identify a class of [hostile work environment] cases" in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors. *Id.*, at 760; see also *Pennsylvania State Police* v. *Suders*, 542 U. S. 129, 143 (2004) (explaining holdings in *Ellerth* and *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998), as dividing hostile work environment

claims into two categories, one in which the employer is strictly liable because a tangible employment action is taken and one in which the employer can make an affirmative defense). *Ellerth* did not discuss the scope of the general anti-discrimination provision. See 524 U. S., at 761 (using "concept of a tangible employment action [that] appears in numerous cases in the Courts of Appeals" only "for resolution of the vicarious liability issue"). And *Ellerth* did not mention Title VII's anti-retaliation provision at all. At most, *Ellerth* sets forth a standard that petitioner and the Solicitor General believe the anti-retaliation provision ought to contain. But it does not compel acceptance of their view.

Nor can we find significant support for their view in the EEOC's interpretations of the provision. We concede that the EEOC stated in its 1991 and 1988 Compliance Manuals that the anti-retaliation provision is limited to "adverse employment-related action." 2 EEOC Compliance Manual §614.1(d), p. 614–5 (1991) (hereinafter EEOC 1991 Manual); EEOC Compliance Manual §614.1(d), p. 614–5 (1988) (hereinafter EEOC 1988 Manual). But in those same manuals the EEOC lists the "[e]ssential [e]lements" of a retaliation claim along with language suggesting a broader interpretation. EEOC 1991 Manual §614.3(d), pp. 614–8 to 614–9 (complainant must show "that (s)he was in some manner subjected to adverse treatment by the respondent because of the protest or opposition"); EEOC 1988 Manual §614.3(d), pp. 614–8 to 614–9 (same).

Moreover, both before and after publication of the 1991 and 1988 manuals, the EEOC similarly expressed a broad interpretation of the anti-retaliation provision. Compare EEOC Interpretive Manual, Reference Manual to Title VII Law for Compliance Personnel §491.2 (1972) (hereinafter 1972 Reference Manual) (§704(a) "is intended to provide 'exceptionally broad protection' for protestors of discrimi-

natory employment practices"), with 2 EEOC Compliance Manual §8, p. 8–13 (1998) (hereinafter EEOC 1998 Manual), available at http://www.eeoc.gov/policy/docs/retal.html (as visited June 20, 2006, and available in Clerk of Court's case file) (§704(a) "prohibit[s] any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity"). And the EEOC 1998 Manual, which offers the Commission's *only* direct statement on the question of whether the anti-retaliation provision is limited to the same employment-related activity covered by the anti-discrimination provision, answers that question in the negative—directly contrary to petitioner's reading of the Act. *Ibid.*

Finally, we do not accept the petitioner's and Solicitor General's view that it is "anomalous" to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination. Brief for Petitioner 17; Brief for United States as *Amicus Curiae* 14–15. Congress has provided similar kinds of protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions. The National Labor Relations Act, to which this Court has "drawn analogies . . . in other Title VII contexts," *Hishon* v. *King & Spalding*, 467 U. S. 69, 76, n. 8 (1984), provides an illustrative example. Compare 29 U. S. C. §158(a)(3) (substantive provision prohibiting employer "discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization") with §158(a)(4) (retaliation provision making it unlawful for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter"); see

also *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 740 (1983) (construing anti-retaliation provision to "prohibi[t] a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities," including the retaliatory filing of a lawsuit against an employee); *NLRB* v. *Scrivener*, 405 U. S. 117, 121–122 (1972) (purpose of the anti-retaliation provision is to ensure that employees are "'completely free from coercion against reporting'" unlawful practices).

In any event, as we have explained, differences in the purpose of the two provisions remove any perceived "anomaly," for they justify this difference of interpretation. See *supra*, at 8–9. Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 292 (1960). Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.

For these reasons, we conclude that Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions." See *supra*, at 5.

B

The anti-retaliation provision protects an individual not

from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon*, 438 F. 3d, at 1219 (quoting *Washington*, 420 F. 3d, at 662).

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998); see *Faragher*, 524 U. S., at 788 (judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'"). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under §704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson*, 519 U. S., at 346. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. *Ibid.* And normally petty slights, minor annoyances,

and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual §8, p. 8–13.

We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, *Suders*, 542 U. S., at 141 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (hostile work environment doctrine).

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, *supra*, at 81–82. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. Cf., *e.g.*, *Washington*, *supra*, at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual §8, p. 8–14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." *Washington*,

supra, at 661.

Finally, we note that contrary to the claim of the concurrence, this standard does *not* require a reviewing court or jury to consider "the nature of the discrimination that led to the filing of the charge." *Post*, at 6 (ALITO, J., concurring in judgment). Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

III

Applying this standard to the facts of this case, we believe that there was a sufficient evidentiary basis to support the jury's verdict on White's retaliation claim. See *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 150–151 (2000). The jury found that two of Burlington's actions amounted to retaliation: the reassignment of White from forklift duty to standard track laborer tasks and the 37-day suspension without pay.

Burlington does not question the jury's determination that the motivation for these acts was retaliatory. But it does question the statutory significance of the harm these acts caused. The District Court instructed the jury to determine whether respondent "suffered a materially adverse change in the terms or conditions of her employment," App. 63, and the Sixth Circuit upheld the jury's finding based on that same stringent interpretation of the anti-retaliation provision (the interpretation that limits §704 to the same employment-related conduct forbidden by §703). Our holding today makes clear that the jury was not required to find that the challenged actions were

related to the terms or conditions of employment. And insofar as the jury also found that the actions were "materially adverse," its findings are adequately supported.

First, Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. Brief for Petitioner 24–25. We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation." 2 EEOC 1991 Manual §614.7, pp. 614–31 to 614–32; see also 1972 Reference Manual §495.2 (noting Commission decision involving an employer's ordering an employee "to do an unpleasant work assignment in retaliation" for filing racial discrimination complaint); EEOC Dec. No. 74–77, 1974 WL 3847, *4 (Jan. 18, 1974) ("Employers have been enjoined" under Title VII "from imposing unpleasant work assignments upon an employee for filing charges").

To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale*, 523 U. S., at 81. But here, the jury had before it considerable evidence that the track labor duties were "by all accounts more arduous and dirtier"; that the "forklift operator position required more qualifications, which is an indication of prestige"; and that "the forklift operator position was

objectively considered a better job and the male employees resented White for occupying it." 364 F. 3d, at 803 (internal quotation marks omitted). Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.

Second, Burlington argues that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay. Burlington says that "it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full back pay" to be unlawful, particularly because Title VII, throughout much of its history, provided no relief in an equitable action for victims in White's position. Brief for Petitioner 36.

We do not find Burlington's last mentioned reference to the nature of Title VII's remedies convincing. After all, throughout its history, Title VII has provided for injunctions to "bar like discrimination in the future," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975) (internal quotation marks omitted), an important form of relief. Pub. L. 88–352, §706(g), 78 Stat. 261, as amended, 42 U. S. C. §2000e–5(g). And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay. In any event, Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory (as White received here) and punitive damages, concluding that the additional remedies were necessary to "'help make victims whole.'" *West* v. *Gibson*, 527 U. S. 212, 219 (1999) (quoting H. R. Rep. No. 102–40, pt. 1, pp. 64–65 (1991)); see 42 U. S. C. §§1981a(a)(1), (b). We would undermine the significance of that congressional judgment were we to conclude that employers could avoid liability in these circumstances.

Neither do we find convincing any claim of insufficient evidence. White did receive backpay. But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused. 1 Tr. 154 ("That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed"). Indeed, she obtained medical treatment for her emotional distress. A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay. Cf. *Mitchell*, 361 U. S., at 292 ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"). Thus, the jury's conclusion that the 37-day suspension without pay was materially adverse-was a reasonable one.

IV

For these reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 05–259

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER *v.* SHEILA WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 22, 2006]

JUSTICE ALITO, concurring in the judgment.

I concur in the judgment, but I disagree with the majority's interpretation of the antiretaliation provision of Title VII of the Civil Rights Act of 1964, 78 Stat. 257, §704(a), as amended, 42 U. S. C. §2000e–3(a). The majority's interpretation has no basis in the statutory language and will, I fear, lead to practical problems.

I

Two provisions of Title VII are important here. Section 703(a) prohibits a broad range of discriminatory employment practices.[1] Among other things, §703(a) makes it unlawful for an employer "*to discriminate against* any individual with respect to his compensation, terms, condi-

[1] Section 703(a) states in pertinent part:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a) (emphasis added).

tions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1) (emphasis added).

A complementary and closely related provision, §704(a), makes it unlawful to "discriminate against" an employee for retaliatory purposes. Section 704(a) states in pertinent part:

> "It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U. S. C. §2000e–3(a) (emphasis added).

In this case, we must ascertain the meaning of the term "discriminate" in §704(a). Two possible interpretations are suggested by the language of §§703(a) and 704(a).

The first is the interpretation that immediately springs to mind if §704(a) is read by itself—*i.e.*, that the term "discriminate" in §704(a) means what the term literally means, to treat differently. Respondent staunchly defends this interpretation, which the majority does not embrace, but this interpretation presents problems that are at least sufficient to raise doubts about its correctness. Respondent's interpretation makes §703(a) narrower in scope than §704(a) and thus implies that the persons whom Title VII is principally designed to protect—victims of discrimination based on race, color, sex, national origin, or religion—receive less protection than victims of retaliation. In addition, respondent's interpretation "makes a federal case" out of any small difference in the way an employee who has engaged in protected conduct is treated. On respondent's view, a retaliation claim must go to the jury

if the employee creates a genuine issue on such questions as whether the employee was given any more or less work than others, was subjected to any more or less supervision, or was treated in a somewhat less friendly manner because of his protected activity. There is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 81 (1998); *Faragher* v. *Boca Raton*, 524 U. S. 775, 786–788 (1998).

The other plausible interpretation, and the one I favor, reads §§703(a) and 704(a) together. Under this reading, "discriminat[ion]" under §704(a) means the discriminatory acts reached by §703(a)—chiefly, discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment." This is not, admittedly, the most straightforward reading of the bare language of §704(a), but it is a reasonable reading that harmonizes §§703(a) and 704(a). It also provides an objective standard that permits insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees who are subjected to real retaliation.

The Courts of Appeals that have interpreted §704(a) in this way state that it requires a materially adverse employment action. See, *e.g.*, *Von Gunten* v. *Maryland*, 243 F. 3d 858, 865 (CA4 2001); *Gupta* v. *Florida Bd. of Regents*, 212 F. 3d 571, 587 (CA11 2000), cert. denied, 531 U. S. 1076 (2001); *Robinson* v. *Pittsburgh*, 120 F. 3d 1286, 1300 (CA3 1997). In *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 761–762 (1998), we "import[ed]" this test for use in a different context—to define the term "tangible employment action," a concept we used to limit an employer's liability for harassment carried out by its supervisors. We explained that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment

with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*, at 761.

II

The majority does not adopt either of the two interpretations noted above. In Part II–A of its opinion, the majority criticizes the interpretation that harmonizes §§703(a) and 704(a) as not sufficiently faithful to the language of §704(a). Although we found the materially adverse employment action test worthy of "import[ation]" in *Ellerth*, the majority now argues that this test is too narrow because it permits employers to take retaliatory measures outside the workplace. *Ante*, at 8–9 (citing *Rochon* v. *Gonzales*, 438 F. 3d 1211, 1213 (CADC 2006); *Berry* v. *Stevinson Chevrolet*, 74 F. 3d 980, 984, 986 (CA10 1996)). But the majority's concern is misplaced.

First, an employer who wishes to retaliate against an employee for engaging in protected conduct is much more likely to do so on the job. There are far more opportunities for retaliation in that setting, and many forms of retaliation off the job constitute crimes and are therefore especially risky.

Second, the materially adverse employment action test is not limited to on-the-job retaliation, as *Rochon*, one of the cases cited by the majority, illustrates. There, a Federal Bureau of Investigation agent claimed that the Bureau had retaliated against him by failing to provide the off-duty security that would otherwise have been furnished. See 438 F. 3d, at 1213–1214. But, for an FBI agent whose life may be threatened during off-duty hours, providing security easily qualifies as a term, condition, or privilege of employment. Certainly, if the FBI had a policy of denying protection to agents of a particular race, such discrimination would be actionable under §703(a).

But in Part II–B, rather than adopting the more literal interpretation based on the language of §704(a) alone, the

majority instead puts that language aside and adopts a third interpretation—one that has no grounding in the statutory language. According to the majority, §704(a) does not reach all retaliatory differences in treatment but only those retaliatory acts that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Ante*, at 13 (internal quotation marks omitted).

I see no sound basis for this test. The language of §704(a), which employs the unadorned term "discriminate," does not support this test. The unstated premise of the majority's reasoning seems to be that §704(a)'s only purpose is to prevent employers from taking those actions that are likely to stop employees from complaining about discrimination, but this unstated premise is unfounded. While surely *one of the purposes* of §704(a) is to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct, there is no reason to suppose that this is §704(a)'s only purpose. Indeed, the majority itself identifies another purpose of the antiretaliation provision: "to prevent harm to individuals" who assert their rights. *Ante*, at 8. Under the majority's test, however, employer conduct that causes harm to an employee is permitted so long as the employer conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination.

III

The practical consequences of the test that the majority adopts strongly suggest that this test is not what Congress intended.

First, the majority's test leads logically to perverse results. Under the majority's test, §704(a) reaches retaliation that well might dissuade an employee from making or supporting "a charge of discrimination." *Ante*, at 13 (in-

ternal quotation marks omitted). I take it that the phrase "*a* charge of discrimination" means the particular charge that the employee in question filed,[2] and if that is the proper interpretation, the nature of the discrimination that led to the filing of the charge must be taken into account in applying §704(a). Specifically, the majority's interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation. A reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation; the costs of filing the charge, including possible retaliation, will have to be great to outweigh the benefits, such as preventing the continuation of the discrimination in the future and obtaining damages and other relief for past discrimination. Because the possibility of relatively severe retaliation will not easily dissuade this employee, the employer will be able to engage in relatively severe retaliation without incurring liability under §704(a). On the other hand, an employee who is subjected to a much milder form of discrimination will be much more easily dissuaded. For this employee, the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge. These topsy-turvy results make no sense.

Second, the majority's conception of a reasonable worker

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[2]The alternative interpretation—that "a charge" does not mean the specific charge filed by the employee but an average or generic charge—would be unworkable. Without gauging the severity of the initial alleged discrimination, a jury cannot possibly compare the costs and benefits of filing a charge and, thus, cannot possibly decide whether the employer's alleged retaliatory conduct is severe enough to dissuade the filing of a charge. A jury will have no way of assessing the severity of the average alleged act of discrimination that leads to the filing of a charge, and, therefore, if "a charge" means an average or generic charge, the majority's test will leave juries hopelessly at sea.

is unclear. Although the majority first states that its test is whether a "reasonable worker" might well be dissuaded, *ante*, at 13 (internal quotation marks omitted), it later suggests that at least some individual characteristics of the actual retaliation victim must be taken into account. The majority comments that "the significance of any given act of retaliation will often depend upon the particular circumstances," and provides the following illustration: "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Ante*, at 14.

This illustration suggests that the majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim. The majority's illustration introduces three individual characteristics: age, gender, and family responsibilities. How many more individual characteristics a court or jury may or must consider is unclear.

Finally, the majority's interpretation contains a loose and unfamiliar causation standard. As noted, the majority's test asks whether an employer's retaliatory act "*well might have dissuaded* a reasonable worker from making or supporting a charge of discrimination." *Ante*, at 13 (internal quotation marks omitted; emphasis added). Especially in an area of the law in which standards of causation are already complex, the introduction of this new and unclear standard is unwelcome.

For these reasons, I would not adopt the majority's test but would hold that §704(a) reaches only those discriminatory practices covered by §703(a).

IV

Applying this interpretation, I would affirm the decision of the Court of Appeals. The actions taken against respondent—her assignment to new and substantially less desirable duties and her suspension without pay—fall within the definition of an "adverse employment action."

With respect to respondent's reassignment, *Ellerth* specifically identified a "reassignment with significantly different responsibilities" as a "tangible employment action." 524 U. S., at 761. Here, as the Court of Appeals stated, "[i]n essence, . . . the reassignment was a demotion." 364 F. 3d 789, 803 (CA6 2004). The "new position was by all accounts more arduous and 'dirtier,'" *ibid.*, and petitioner's sole stated rationale for the reassignment was that respondent's prior duties were better suited for someone with greater seniority. This was virtually an admission that respondent was demoted when those responsibilities were taken away from her.

I would hold that respondent's suspension without pay likewise satisfied the materially adverse employment action test. Accordingly, although I would hold that a plaintiff asserting a §704(a) retaliation claim must show the same type of materially adverse employment action that is required for a §703(a) discrimination claim, I would hold that petitioner met that standard in this case, and I, therefore, concur in the judgment.